No. 00-1614-CFX Title: National Railroad Passenger Corporation, Petitioner
v.
Abner Morgan, Jr.

Docketed: April 23, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 23 2001	Petition for writ of certiorari filed. (Response due May 23, 2001)
	May 23 2001	Brief of respondent Abner J. Morgan, Jr. in opposition filed.
	Jun 5 2001	DISTRIBUTED for Conference of June 21, 2001
	Jun 12 2001	Reply brief of petitioner National Railroad Passenger Corporation filed.
	Jun 25 2001	Petition GRANTED. SET FOR ARGUMENT January 9, 2002. **********
	Aug 1 2001	Order extending time to file brief of petitioner on the merits until August 29, 2001.
	Aug 29 2001	Joint appendix filed.
	Aug 29 2001	Brief of petitioner National Railroad Passenger Corporation filed.
	Aug 29 2001	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
	Aug 29 2001	Brief amicus curiae of United States filed.
	Sep 14 2001	Order extending time to file respondent's brief on the merits to and including October 29, 2001.
	Oct 29 2001	Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
	Oct 29 2001	Brief amici curiae of Impact Fund, et al. filed.
	Oct 29 2001	Brief of respondent Abner Morgan filed.
	Nov 5 2001	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Nov 9 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 26 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 26 2001	CIRCULATED.
	Dec 3 2001	Reply brief of petitioner National Railroad Passenger Corporation filed.
	Jan 9 2002	ARGUED.

Supreme Court, U.S.
FILED

No. ___ 001614 APR 23 2001

OFFICE OF THE

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held, in conflict with every other circuit that has decided the question, that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. National Railroad Passenger Corporation, a federally chartered corporation, dba Amtrak, defendant-appellee; and

2. Abner Morgan, Jr., plaintiff-appellant.

Petitioner National Railroad Passenger Corporation is federally chartered and is not a publicly traded corporation. The United States of America owns 100% of the preferred shares under the name of the Secretary of Transportation. The following companies each own 10% or more of the corporation's common stock: Burlington Northern/Santa Fe Railroad Company and American Premier Underwriters (successor to the Penn Central Railroad).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 14(b) AND 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT	2
A. Morgan's Employment At Amtrak	4
B. Proceedings Below	7
REASONS FOR GRANTING THE WRIT	9
I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LANGUAGE OF SECTION 706(e) AND SUPREME COURT PRECEDENT HOLDING THAT A DISCRETE EVENT TRIGGERS AN EMPLOYEE'S OBLIGATION TO FILE A CHARGE PURSUANT TO TITLE VII	11
II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS' AND THE SUPREME COURT'S LIMITED APPROACH TO THE CONTINUING VIOLATION DOCTRINE	16
A. The Ninth Circuit's Decision Conflicts With Decisions Of Every Other Circuit Court That Has Decided The Issue	18
B. The Ninth Circuit's Decision Conflicts With This Court's Rulings on The Continuing Violation Doctrine	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	11, 12
Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993)	16
Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999)	9
Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995)	15
Bell v. Chesapeake & Ohio Ry., 929 F.2d 220 (6th Cir. 1991)	21
Berry v. Bd. of Supervisors, 715 F.2d 971 (5th Cir. 1983)	2, 3, 8, 18, 19, 21
Bosley v. Merit Sys. Prot. Bd., 162 F.3d 665 (Fed. Cir. 1998)	21
Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999)	15
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965)	23
Caminetti v. United States, 242 U.S. 470 (1917)	12
Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977)	16
Chardon v. Fernandez, 454 U.S. 6 (1981)	13, 24
Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969)	16
Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)	23
Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000)	21
Curry v. District of Columbia, 195 F.3d 654 (D.C. Cir. 1999)	21
Delaware State Coll. v. Ricks, 449 U.S. 250 (1980)	2, 13, 14, 23, 24, 25
Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998)	9

TABLE OF AUTHORITIES—Continued

	Page
Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980)	17
Emmert v. Runyon, No. 98-2027, 1999 WL 253632 (4th Cir. Apr. 29, 1999)	21
Fielder v. UAL Corp., 218 F.3d 973 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937)	2, 9, 10
Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1996)	2, 3, 8, 17, 18, 19, 20
Garrison v. Burke, 165 F.3d 565 (7th Cir. 1999)	18
Green v. Los Angeles County Superintendent Of Schools, 883 F.2d 1472 (9th Cir. 1989)	10
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)	12
Guaranty Trust Co. v. United States, 304 U.S. 126 (1938)	22
Hallstrom v. Tillamook County, 493 U.S. 20 (1989)	13
Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993)	2
Havens Realty Co. v. Coleman, 455 U.S. 363 (1982)	13
High v. Univ. of Minnesota, 236 F.3d 909 (8th Cir. 2000)	15
Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998)	15
International Union of Electrical, Radio & Machine Workers, v. Robbins & Myers, Inc., 429 U.S. 229 (1976)	12, 13, 14, 23, 24
Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997)	20
Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975)	11, 24, 25
Klein v. McGowan, 198 F.3d 705 (8th Cir. 1999)	20

TABLE OF AUTHORITIES—Continued

Page

Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607 (1st Cir. 2000) 19
Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1991) 21
Milton v. Weinberger, 645 F.2d 1070 (D.C. Cir. 1982) 3
O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) 21, 22
Order of Railway Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) 23
Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998) 3, 19, 21
Purrington v. Univ. of Utah, 996 F.2d 1025 (10th Cir. 1993) 18
Richard v. McDonnell Douglas Co., 469 F.2d 1249 (8th Cir. 1972) 16
Roberts v. Gadsen Mem'l Hosp., 835 F.2d 793, *as modified at* 850 F.2d 1549 (11th Cir. 1988) 3, 8, 21
Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997) 15, 21
Sabree v. United Brotherhood of Carpenters and Joiners Local, 33, 921 F.2d 396 (1st Cir. 1990) 2, 18, 21
Salgado v. City of New York, 2001 WL 290051 (S.D.N.Y. March 26, 2001) 22
Seward v. Harford County, 2001 WL 283090 (D. Md. March 13, 2001) 21
Stewart v. Booker T. Washington Inst., 232 F.3d 844 (11th Cir. 2000) 15
United Airlines v. Evans, 431 U.S. 553 (1977) 12, 13, 23, 24, 25
United States v. Kubrick, 444 U.S. 111 (1979) 22
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 12

TABLE OF AUTHORITIES—Continued

Page

Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996) 18, 19, 21
Webb v. Cardiothoracic Surgery Ass'n., 139 F.3d 532 (5th Cir. 1998) 18, 19
West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995) 15, 20, 21
Wood v. Carpenter, 101 U.S 135 (1879) 22, 23
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 2, 17

STATUTES

28 U.S.C. § 1254(1) (1982) 1
42 U.S.C. § 2000e-2 (1982) 2
42 U.S.C. § 2000e-3 (1982) 2
42 U.S.C. § 2000e-5(e)(1) (1982) 1, 2, 12, 13
42 U.S.C. § 2000e-5(f)(1) (1982) 12

MISCELLANEOUS

T. A. Crivens, *The Continuing Violation Theory and Systematic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 Vand. L. Rev. 1171 (1988) 17
2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1351 (3d ed. 1996) 17
Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531 (2000) 17
R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 Am. Bus. L.J. 365 (1993) 17

PETITION FOR WRIT OF CERTIORARI

National Railroad Passenger Corporation, dba Amtrak, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 232 F.3d 1008. The order of the court denying rehearing and rehearing en banc (App., *infra*, 23a) is unreported. The district court's opinion granting partial summary judgment to petitioner (App., *infra*, 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2000. App., *infra*, 1a. A petition for rehearing and rehearing en banc was denied on January 22, 2001. App., *infra*, 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1) (1982), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race. 42 U.S.C. § 2000e-2 *et. seq.* Prohibited discrimination includes racial harassment and retaliation. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); 42 U.S.C. § 2000e-3.

Title VII requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time-barred unless the employee files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the incident, or within 300 days of the incident if the employee first files the charge with a state or local agency. *Id.* The limitations period begins to run on the date of the alleged "unlawful employment practice." *Id.; Delaware State Coll. v. Ricks*, 449 U.S. 250, 257 (1980). When the unlawful employment practice is a discrete event—such as a termination—the limitations period runs from the date of that event. *Ricks*, 449 U.S. at 503-04; *Berry v. Bd. of Supervisors*, 715 F.2d 971, 980 (5th Cir. 1983).

Although there is no statutory exception to the limitations period, this Court recognized that the 300-day filing period, like a statute of limitations, may be subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Accordingly, the courts of appeals recognize a variant of the equitable "continuing violation" doctrine which allows plaintiffs to join time-barred Title VII claims with related claims that are the subject of a timely-filed administrative charge under certain circumstances. *See e.g., Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996); *Sabree v. United Brotherhood of Carpenters and Joiners Local* 33, 921 F.2d 396 (1st Cir. 1990); *Roberts v. Gadsen Mem'l Hosp.*, 835 F.2d 793, *as modified at* 850 F.2d 1549 (11th Cir. 1988); *Berry*, 715 F.2d 971.

The most widely accepted approach for analyzing the continuing violation doctrine was articulated by the Fifth Circuit in *Berry*. *Berry*, 715 F.2d at 981. The *Berry* standard permits use of the continuing violation doctrine to save otherwise time-barred claims if the alleged acts are similar, if they are recurring, and if the untimely acts did not have the degree of permanence which would trigger an employee's awareness of and duty to assert his rights. *Id.* The Seventh Circuit's standard as set forth in *Galloway* and adopted by the First and Federal circuit courts of appeals limits the application of the continuing violation doctrine to cases in which "it would have been unreasonable to expect the plaintiff to sue before the statute ran on [the time-barred] conduct." *Galloway*, 232 F.3d at 1014-15. With the exception of the Ninth Circuit, the courts of appeals uniformly refuse to allow the invocation of the doctrine to revive stale claims that a knowing plaintiff allowed to lapse. *See e.g., Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998); *Roberts*, 835 F.2d 793; *Milton v. Weinberger*, 645 F.2d 1070, 1077 (D.C. Cir. 1981).

In this case, a panel of the Ninth Circuit expressly rejected the Seventh Circuit's continuing violation analysis in *Galloway* and reaffirmed its recent rejection of *Berry*. App., *infra*, 15a. Relying on its decision in *Fielder*, the court of appeals allowed the plaintiff who knowingly permitted numerous claims to lapse to use the continuing violation doctrine to revive those stale claims. *Id.* The court of appeals held that there was no "notice" limitation on the continuing violation doctrine and that a plaintiff was permitted to use the doctrine and recover damages for pre-limitations conduct so long as it is "sufficiently related" to post-limitations conduct. App., *infra*, 15a; 18a. In so doing, the court effectively eradicated Title VII's limitations period.

A. Morgan's Employment At Amtrak[1]

Abner J. Morgan, Jr. ("Morgan"), an African-American male, began working at Amtrak in August 1990 as an electrician's helper in the Oakland Maintenance Yard (the "Yard"). App., *infra*, 7a. Morgan claimed that he believed that he was being hired as an electrician, that he performed the work of an electrician and that less qualified Caucasians were hired as electricians. *Id.* According to Morgan, his job was not reclassified nor his pay increased until April 1992. *Id.*

Morgan claims that shortly after he began working at Amtrak, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by a group of Amtrak managers, specifically Robert Vandenburg, the Facility Manager of the Yard, Jerry Denton, Mike Bordenave, Ray Borge and Earl Geske. App., *infra*, 6a. This conduct allegedly continued throughout his employment with Amtrak and culminated in his termination in March 1995. *Id.*

Morgan testified that the first discriminatory act occurred in February 1991 when he was charged with violating a disciplinary rule for refusing to attend a meeting without union representation. App., *infra*, 7a. Under applicable work rules, an employee is entitled to union representation at any meeting that might lead to disciplinary action. *Id.* at 7a n.4. Morgan was ordered to attend a meeting with Vandenburg and Denton the day after he had called in sick. Believing that

[1] For purposes of ruling on and reviewing the grant of partial summary judgment, the district court and the court of appeals accepted Morgan's statement of facts as true. The court of appeals, however, supplemented Morgan's statement of facts with trial testimony where it favored Morgan. At trial, Amtrak disputed many of the facts relied on by Morgan in opposing summary judgment, and the fully developed trial record demonstrates that many of the allegations were unfounded. For the purposes of this petition, Amtrak is limited to the facts as described by the courts below.

the meeting might lead to disciplinary action, Morgan refused to attend. On March 22, 1991, following a full investigatory hearing into the incident, Morgan was terminated.[2] *Id.* The termination later was reduced to a ten-day suspension and Morgan received back pay for all but ten days. *Id.*

Morgan claims that he requested entrance into the electrician apprentice program in August 1991. App., *infra*, 7a-8a. He claims that he received no official response from Amtrak's personnel office, but that Vandenburg told him that he stood "a snowball's chance in hell of becoming an electrician." *Id.* at 8a.

Morgan recognized early in his employment that the alleged conduct of his supervisors and co-workers could be grounds for legal action. In October 1991, following the termination/suspension and the alleged denial of training, Morgan first complained about racial discrimination at Amtrak. App., *infra*, 28a. Morgan filed a written complaint with Amtrak's internal EEO office citing "blatant racism" and offering specific instances of allegedly discriminatory conduct. *Id.* He sent a copy of this letter to Congressman Dellums. *Id.* Morgan testified that he never received a formal response to this complaint. *Id.*

Throughout the remainder of Morgan's employment at Amtrak, he continued to make complaints of racial discrimination and retaliation both externally and internally to

[2] Morgan's employment was covered by a collective bargaining agreement. App., *infra*, 27a. Therefore, before he could be disciplined for rules infractions, he was entitled to be notified of the charges against him and to have a full investigatory hearing at which he was represented by his union and could present evidence and cross-examine witnesses. *Id.* at 27a n.4. The hearing was conducted by a Hearing Officer who determined whether the charges were proven. If the charges were proven, the Hearing Officer's decision was forwarded to the department head who imposed discipline. *Id.* These determinations were subject to multi-layered review and ultimately could be appealed to the National Railroad Adjustment Board.

Amtrak's EEO office. Morgan and a group of other Amtrak employees met with Congresswoman Boxer to express their concerns about discriminatory conditions at the Yard in late 1991. App., *infra*, 8a. In response to the complaint, Congresswoman Boxer contacted Amtrak's Inspector General, Fred Weiderhold. *Id.* at 40a. Weiderhold visited the Yard three times in 1992. *Id.* On one of these occasions, Weiderhold met Morgan. *Id.* Morgan claims that he "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to [Weiderhold's] attention." *Id.*

Morgan also continued to complain about racial discrimination to Amtrak's EEO office. In May 1993, Morgan filed two separate internal complaints alleging racial discrimination and retaliation with Amtrak's EEO office. App., *infra*, 29a; 30a. Morgan claims that in October 1993, Vandenburg assaulted him by placing his hands on Morgan's shoulders, pushing down and whispering in his ear. *Id.* at 10a. Morgan reported the alleged assault to the police and filed a formal complaint with Amtrak's EEO office. *Id.* at 31a. Morgan testified that Amtrak did not investigate his complaint. In January 1994, Morgan again complained about racial discrimination to Amtrak's EEO office following the cancellation of scheduled training. *Id.* at 11a. Again, Morgan claims that Amtrak did not formally respond to the complaint. *Id.* In October 1994, Morgan made his last complaint of racial discrimination to Amtrak's EEO office and again, according to Morgan, no response was forthcoming. *Id.* In sum, by the time Morgan was suspended in February 1995, he had complained about racial discrimination or retaliation at least nine times over the course of four years.

Despite his complaints, Morgan claims that the discrimination and harassment never stopped. Morgan claims that he was subjected to discriminatory or retaliatory discipline on at least ten occasions between October 1991 and the end of his

employment in March 1995. App., *infra*, 8a-12a. This discipline consisted of being issued written and oral counselings, being unfairly charged with rules violations, being suspended and ultimately his employment being terminated. In addition, he claims that he was unfairly denied training on four occasions.

Although Morgan believed that the alleged conduct was discriminatory and unlawful, he nevertheless refrained from filing an administrative charge until February 27, 1995, two days after he was suspended. App., *infra*, 13a. At that time, he filed a charge alleging discrimination and retaliation with the EEOC and cross-filed with the California Department of Fair Employment and Housing. *Id.* On March 3, 1995, following a full investigatory hearing, Morgan was terminated. *Id.* at 12a. On March 8, 1995, Morgan amended his charge to allege that this termination constituted unlawful discrimination and retaliation. *Id.* at 37a. At the time he filed his administrative charge in February 1995, only six allegedly discriminatory incidents fell within the 300-day limitations period.

B. Proceedings Below

The district court granted partial summary judgment in petitioner's favor on all acts of alleged discrimination which occurred more than 300 days before Morgan filed his administrative charge of discrimination. App., *infra*, 38a-40a. The court also granted partial summary judgment on three of Morgan's six timely claims of alleged discrimination: (1) denial of pay for jury duty in June 1994 and January and February 1995, (2) denial of access to review his work file in December 1994, and (3) denial of union representation during a December 1994 meeting—ruling that Morgan failed to establish a prima facie case of discrimination with respect to each of those claims. *Id.* at 49a-50a; 51a. The court held that Morgan failed to establish a prima facie case of discrimination for denial of pay for jury duty because he

offered no evidence that the action was discriminatory or retaliatory. *Id.* at 49a-50a. The district court held that Morgan failed to establish a prima facie case of discrimination relating to the alleged refusal to allow him to review his work file because he could not identify an adverse employment action flowing from that denial. *Id.* at 51a. The district court also held that Morgan could not recover for the alleged denial of union representation at a December 1994 meeting because he never addressed this claim in his opposition to Amtrak's summary judgment motion. *Id.*

In rejecting Morgan's argument that the continuing violation doctrine resuscitated all of his claims dating back to 1991, the district court relied on *Galloway*, 78 F.3d 1164, 1167; *Roberts*, 835 F.2d 793, and *Berry*, 715 F.2d 971, 981. App., *infra*, 38a-40a. The court held that a plaintiff may not recover for conduct that "occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations." *Id.* at 39a (quoting *Galloway*, 78 F.3d at 1167). The court held that Morgan was not entitled to invoke the continuing violation doctrine because as early as 1991 he claimed to be the victim of discrimination and retaliation by Amtrak and yet he did not file his administrative charge until 1995.[3] App., *infra*, 39a-40a.

The three remaining claims of alleged discrimination—suspension in September 1994, denial of training in October 1994, suspension in February 1995 leading to termination of Morgan's employment in March 1995—were tried before a

[3] The court, however, did permit Morgan to present evidence at trial of acts occurring prior to the limitations period to the extent they were relevant to his timely claims of discrimination and retaliation. *Id.* at 40a n.9.

jury. App., *infra*, 13a. During the trial, Morgan introduced evidence spanning the entire period of his employment at Amtrak. The jury returned a unanimous verdict in favor of Amtrak on November 8, 1998. Judgment was entered on November 25, 1998. *Id.* Plaintiff appealed on a number of grounds including that the district court erred in granting partial summary judgment to Amtrak with respect to claims occurring more than 300 days prior to the filing of the administrative charge. *Id.* at 6a.

The court of appeals reversed the district court's granting of partial summary judgment holding that the lower court erroneously relied on *Galloway* to reject Morgan's reliance on the continuing violation doctrine. App., *infra*, 15a. Specifically, the court held that it "has never adopted a strict notice requirement as a litmus test for application of the continuing violation doctrine." *Id.* Citing its own decisions in *Fielder*, *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999) and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1007 (9th Cir. 1998), the court of appeals stated that the relevant inquiry in determining whether to invoke the continuing violation doctrine was whether the pre-limitations conduct at issue is "sufficiently related" to the post-limitations conduct. App., *infra*, at 18a. Using that test, articulated for the first time in *Fielder*, the court of appeals analyzed Morgan's "three distinct Title VII claims . . . discrimination, hostile environment and retaliation" and held that Morgan could rely on the continuing violation doctrine with respect to each of his three claims. *Id.* at 18a-20a. The court of appeals vacated the grant of partial summary judgment and the judgment on the verdict and granted Morgan a new trial on all of his claims. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted in this matter as the outcome in this case conflicts with decisions of this Court regarding the enforcement of Title VII's limitations

period. In addition, the Ninth Circuit expressly rejected the analyses of the continuing violation doctrine articulated by the Fifth and Seventh circuit courts of appeals. Finally, the Ninth Circuit's decision effectively nullifies Title VII's statute of limitations for a wide array of cases, and thus, is inconsistent with both the statute itself and the purposes behind the limitations period. In this case, the Ninth Circuit openly acknowledged the conflict between the circuits and reaffirmed its adherence to the "sufficiently related" test.

On March 7, 2001, UAL Corporation filed a petition for writ of certiorari seeking review of a decision of the Ninth Circuit court of appeals. *UAL v. Fielder*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937) *seeking review of* 218 F.3d 973 (9th Cir. 2000). In *Fielder*, the Ninth Circuit held that in hostile environment and sexual harassment cases, a plaintiff may use the continuing violation doctrine to link timely and untimely Title VII claims whenever the "alleged discriminatory acts [which occurred within Title VII's limitations period] are related closely enough to constitute a continuing violation." *Fielder*, 218 F.3d at 987, (quoting *Green v. Los Angeles County Superintendent Of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989)). In this case, the Ninth Circuit has gone a step farther—holding that its "related closely enough" or "sufficiently related" test is not limited to cases of hostile environment and sexual harassment but applies to all cases of discrimination. App., *infra*, 17a-18a. In both this case and in *Fielder*, the Ninth Circuit applied its holding and allowed plaintiffs to recover for an assortment of very different time-barred claims under a continuing violation theory, notwithstanding their failure to file timely administrative charges challenging conduct which they concluded was unlawful at or shortly after the time it occurred. *Id.; Fielder*, 218 F.3d at 989. Indeed, in this case, the Ninth Circuit acknowledged that its continuing violation test yields results at odds with those in other circuits. It noted that under the *Berry* and *Galloway* tests, the plaintiff in *Fielder* would

not have been able to rely on the continuing violation doctrine to recover because "the harassing behavior was such that a reasonable person would have been on notice that her rights were violated . . ." App., *infra*, 15a.

This case, like *Fielder*, presents the Court with an opportunity to provide guidance as to what events trigger the running of the limitations period under Title VII and when, if ever, a plaintiff can join untimely claims of alleged discrimination with claims that were the subject of a timely charge. Further review is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LANGUAGE OF SECTION 706(e) AND SUPREME COURT PRECEDENT HOLDING THAT A DISCRETE EVENT TRIGGERS AN EMPLOYEE'S OBLIGATION TO FILE A CHARGE PURSUANT TO TITLE VII

The Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period. There is no statutory basis for this interpretation of Section 706(e). Moreover, the Ninth Circuit's decision expressly conflicts with this Court's rulings that a discrete event triggers the running of the limitations period. Finally, the Ninth Circuit's decision conflicts with the decisions of other courts of appeals which adhere to the rule that a discrete event triggers Section 706(e)'s limitations period. The decision below is erroneous and should be reversed.

Title VII was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It creates a comprehensive statutory system to vindicate civil rights. *Johnson v. Ry. Express Agency, Inc.* 421 U.S. 454, 455 (1975). That

system includes a limitations period—Section 706(e). Section 706(e) requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time-barred unless the employee files a charge of discrimination with the EEOC within 180 days of the alleged unlawful occurrence, or within 300 days of the allegedly unlawful occurrence if the employee first files the charge with a state or local agency. *Id; United Airlines v. Evans*, 431 U.S. 553, 555 n.4 (1977) (holding that "[t]imely filing is a prerequisite to maintenance of a Title VII action."). If, after 180 days, the EEOC is not successful in obtaining voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee may demand a right-to-sue letter and institute a private action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee must institute the lawsuit within 90 days after receiving the right-to-sue letter or risk losing his claim. *Alexander*, 415 U.S. at 47.

Congress defined Title VII's jurisdictional prerequisites "with precision," *Id.*, and there is no statutory exception to this limitations period. The sole statutory extension of Section 706(e)'s limitations period occurs when the "person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from" the alleged discriminatory practice. 42 U.S.C. § 2000e-(5)(e)(1); *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). It is well-settled that where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (finding the terms of the statute of limitations applicable because this "is not one of the rare cases in which 'the literal application of the statute will

produce a result demonstrably at odds with the intentions of its drafters.'")); *Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989) (noting that the words of the statute are conclusive). The language of Section 706(e) is plain—it provides that a charge of discrimination "shall be filed" with the EEOC within 180 days of the alleged unlawful employment action. 42 U.S.C. § 2000e-5(e)(1). As this Court noted, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom*, 493 U.S. at 31.

Moreover, this Court has ruled that the Title VII limitations period begins to run from the date of the discrete discriminatory act, not from the date the last effect of that act is felt.[4] *Ricks*, 449 U.S. at 257-8; *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (noting that "the proper focus is on the time of the discriminatory act, not at the point at which the *consequences* of the act become painful."); *see also Evans*, 431 U.S. at 558 (noting that the focus is on whether there is a present violation not on whether there are present effects of a past violation.); *Robbins & Myers*, 429 U.S. at 234; *Cf., Havens Realty Co. v. Coleman*, 455 U.S. 363, 381 (1982) (holding that under the Fair Housing Act a tester could not invoke the continuing violation doctrine to recover for "four isolated occasions" on which she was given false information). Accordingly, this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim.

For example, in *Robbins & Myers*, the plaintiff believed that she was fired because of her race in violation of both the applicable collective bargaining agreement and Title VII. She promptly filed a grievance with the union alleging unfair action, but waited until after the expiration of Title VII's

[4] Continuity of employment alone is not sufficient to extend the limitations period. *Ricks*, 449 U.S. at 257.

limitations period to file her charge with the EEOC. *Robbins & Myers*, 429 U.S. at 229. The plaintiff conceded that filing her grievance did not prevent her from immediately filing an EEOC charge. *Id.* at 238, n.10. She argued that her charge was timely filed because the alleged unlawful employment practice occurred at the conclusion of the grievance-arbitration proceedings, not on the date of her termination. *Id.* at 238. This Court rejected plaintiff's argument holding that the effective date for purposes of the limitations period was the date of her termination. *Id.* at 234-35.

Likewise, in *Ricks*, this Court rejected a plaintiff's attempt to use the continuing violation doctrine to extend the limitations period to resuscitate his time-barred discrimination claim. *Ricks*, 449 U.S. at 257-58. In *Ricks*, a black Liberian college professor was denied tenure in February 1973. *Id.* at 252. Following a denial of an appeal of the tenure decision, the college's Board of Trustees offered Ricks a one-year terminal contract. *Id.* at 253. Ricks accepted the contract and worked until its expiration in June 1975. *Id.* at 253-54. In April 1975, Ricks filed a charge with the EEOC alleging discrimination based on national origin. *Id.* at 254. The district court held that Ricks' claim was time-barred because the denial of tenure occurred more than 180 days prior to the filing of the EEO charge. *Id.* at 254-55. The court of appeals reversed, holding that the limitations period did not begin to run until June 1975 upon the expiration of the one-year contract. *Id.* at 255-56. This Court reversed and held that for purposes of the limitations period, the inquiry must focus on the date of the allegedly unlawful conduct—the denial of tenure. *Id.* at 256-57. This Court held that the limitations period normally commences when the employer's decision is made even when the effects of that decision linger for some time thereafter. *Id.* at 261.

The Ninth Circuit's decision clearly conflicts with this Court's rulings in *Ricks* and *Robbins & Myers*, and with the

decisions of the other circuit courts of appeals.[5] The Ninth Circuit's "sufficiently related" test effectively eliminates the limitations period in any case in which an alleged act of discrimination occurs within the 300 days prior to plaintiff filing an EEO charge. In this case, the first alleged act of discrimination occurred in February 1991, when Amtrak initially terminated Morgan.[6] App., *infra*, 7a.. Shortly after that termination, Morgan complained that he was the victim of racial discrimination and specifically cited the termination as an example of discrimination. *Id.* at 8a. This Court's rulings mandate that the limitations period for that termination runs from the date of the termination. Likewise,

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[5] With the exception of the Ninth Circuit, the courts of appeals have followed this Court's precedent and have held that discrete events such as denial of promotion, denial of training, and termination trigger the running of Title VII's limitations period for such events even in cases in which the plaintiff alleges subsequent discriminatory acts. *See e.g., High v. Univ. of Minnesota*, 236 F.3d 909 (8th Cir. 2000) (finding failure to promote is a discrete event triggering the limitations period); *Stewart v. Booker T. Washington Inst.*, 232 F.3d 844, 850 (11th Cir. 2000) (precluding use of continuing violation doctrine as denial of transfer is a discrete event triggering the limitations period); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999) (finding refusal to hire is a discrete event triggering limitations period; claim could not be revived by combining it with timely refusal to hire claim); *Huckabay v. Moore*, 142 F.3d 233, 239-40 (5th Cir. 1998) (preventing combining stale demotion and failure to promote claims with timely harassment claims as, "demotion is the sort of discrete and salient event that should put an employee on notice that a cause of action has accrued"); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483-84 (3d Cir. 1997) (holding failure to promote and denial of training claims are discrete events that "cannot be regarded as having been timely by reason of [plaintiff's] other allegations of discriminatory treatment."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc); *Cf., West v. Philadelphia Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995) ("[T]he harassment did not cause a discrete event such as a lost job or a denied promotion and, thus did not trigger a duty of the plaintiff to assert his rights arising from the deprivation").

[6] This termination was later reduced to a suspension. App., *infra*, 7a.

other discrete events complained of by Morgan—including denial of training and failure to promote—should trigger the 300-day limitations period for those events. The Ninth Circuit, however, ignored precedent and permitted Morgan to use the continuing violation doctrine and reach back four years to resuscitate his stale claims. In fact, under the Ninth Circuit's analysis, the plaintiffs in *Robbins & Myers* and *Ricks* both would have been permitted to recover for any allegedly discriminatory event stretching back to the beginning of their employment. The Ninth Circuit's decision conflicts with this Court's precedent and is erroneous. This Court should intervene to correct this decision.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS' AND THE SUPREME COURT'S LIMITED APPROACH TO THE CONTINUING VIOLATION DOCTRINE

Shortly after the passage of Title VII, the courts began to recognize a judicially-created continuing violation exception to Title VII's short limitations period in cases where a defendant's conduct was deemed continuing in nature. *See e.g., Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Richard v. McDonnell Douglas Co.*, 469 F.2d 1249 (8th Cir. 1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-91 (7th Cir. 1969). In these cases, the courts used the continuing violation doctrine to allow plaintiffs to recover based on acts that otherwise would be time-barred. The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993). This Court tacitly approved the use of the continuing violation doctrine under certain circumstance when it held that Title VII's

limitations period may be subject to waiver, estoppel and equitable tolling. *Zipes*, 455 U.S. 385.

Early development of the continuing violation doctrine was aptly described as "inconsistent and confusing." *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 977 (5th Cir. 1980). This confusion continues today. The courts of appeals have interpreted the doctrine in widely divergent ways and apply different standards to interpret similar facts resulting in contradictory outcomes. The widespread inconsistency and confusion has been recognized by both the courts and commentators. *See Galloway*, 78 F.3d at 1165 ("The question when conduct occurring outside the statute of limitations may, by virtue of its link with recent conduct, be made a basis for a legal claim is a vexing one . . ."); Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531 (2000) (describing the "increasingly complex and divergent application of the continuing violation doctrine in sexual harassment and other types of employment discrimination cases."); 2 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 1351 (3d ed. 1996) (citing the continuing violation doctrine as "the most muddled area in all of employment discrimination law"); R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 Am. Bus. L.J. 365, 382-83 (1993) (noting that "[b]ecause of the limited guidance from the U.S. Supreme Court, the federal circuits have adopted different standards for implementing the continuing violation doctrine"); T. Crivens, *The Continuing Violation Theory and Systematic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 Vand. L. Rev. 1171, 1172 (1988) (stating that the continuing violation doctrine is "one of the most confusing theories in employment discrimination law. . .").

Prior to the Ninth Circuit's decisions in this case and *Fielder*, the courts of appeals agreed that use of the

continuing violation doctrine was inappropriate in cases where the plaintiff was aware of the discriminatory nature of the acts at the time they were taking place. *See e.g., Garrison v. Burke*, 165 F.3d 565 (7th Cir. 1999); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Webb v. Cardiothoracic Surgery Ass'n.*, 139 F.3d 532, 538 (5th Cir. 1998); *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993); *Sabree*, 921 F.2d 396. The Ninth Circuit has now explicitly rejected the analyses used by other circuits. As such, review by this Court is necessary to establish uniformity in the application of the continuing violation doctrine.

A. The Ninth Circuit's Decision Conflicts With Decisions Of Every Other Circuit Court That Has Decided The Issue.

The decision below is in direct conflict with, and rejects the analyses of, both the Seventh Circuit in *Galloway*, 78 F.3d at 1167 and the Fifth Circuit in *Berry*, 715 F.2d 971. In *Galloway*, the Seventh Circuit held that a plaintiff may not rely on the continuing violation doctrine "unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway*, 78 F.3d at 1167. In arriving at this conclusion, the Seventh Circuit balanced the competing social interest in "encouraging the prompt filing of claims and by doing so of enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities," with equitable interest in protecting a plaintiff who files a Title VII charge as soon as he is aware that his rights have been violated. *Id.* at 1165; 1166.

In *Berry*, the Fifth Circuit adopted a three-factor analysis to balance these competing interests. *Berry*, 715 F.2d at 979-980. Under the Fifth Circuit's analysis, before being

permitted to use the continuing violation doctrine, a plaintiff must show first that the acts involve the same type of discrimination, and second, that they are recurring rather than an isolated work assignment or employment decision. The third factor, which the Fifth Circuit considers the most important, is whether the early untimely act had "a degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights" or which should indicate that the discrimination will continue "without being dependent on a continuing intent to discriminate . . ." *Id.* at 981. If the early untimely act is sufficiently permanent in nature, a plaintiff is not permitted to rely on the continuing violation doctrine.

Under both the *Berry* and the *Galloway* analyses, the continuing violation doctrine cannot be used by a plaintiff who knows that he is a victim of discrimination, but fails to file a charge within the limitations period. *See Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 612 (1st Cir. 2000) (holding handwritten note by plaintiff identifying acts as discriminatory written over a year before the charge filed precluded plaintiff from relying on the continuing violation doctrine); *Provencher*, 145 F.3d at 15 (holding plaintiff's admission that he knew he was being harassed long before he filed charge precluded invocation of the continuing violation doctrine); *Van Zant*, 80 F.3d at 713 (stating that the timeliness of a discrimination claim is to be measured "from the date the claimant had notice of the allegedly discriminatory action"); *Webb*, 139 F.3d 532, 538 (holding that plaintiff was precluded from relying on continuing violation doctrine where she admitted that she knew she was being harassed and failed to file a timely charge).

Although the Ninth Circuit distinguished *Berry* in its decision in *Fielder* on the basis that *Berry* was an equal pay and gender discrimination case, *Fielder*, 218 F.3d at 987 n.10,

it dropped any pretense of distinguishing *Berry* and *Galloway* in this case. App., *infra*, 15a. Here, the court of appeals rejected both *Berry* and *Galloway* and held that Ninth Circuit precedent "precludes such a notice limitation on the continuing violation doctrine." *Id.* Indeed, the Ninth Circuit's "sufficiently related" test does not balance the competing interests recognized in *Berry* and *Galloway*. Under the Ninth Circuit's test, the societal interest in promoting prompt filing of claims is absent and the scales tip entirely in favor of allowing plaintiffs to combine timely and untimely claims without regard to the existence of the limitations period. In fact, the Ninth Circuit's decision permits a plaintiff who knew that his rights were being violated to sit on his rights indefinitely. App., *infra*, 15a. As Judge Kleinfeld noted in his dissent in *Fielder*, "[t]he practical consequence of the majority opinion is to keep alive incidents of claimed [discrimination] permanently, with no statute of limitations at all." *Fielder*, 218 F.3d at 990. This is precisely the outcome that the *Berry* and *Galloway* courts sought to avoid.

Despite the Ninth Circuit's rejection of the *Berry* and *Galloway* analyses, other courts of appeals have adopted these two analyses.[7] The Third, Sixth, Tenth and Eleventh Circuits apply the *Berry* factors in determining whether use of

[7] The Eighth Circuit is the only other circuit with case law resembling the Ninth Circuit's "sufficiently related" test. However, the Eighth Circuit does not appear to have adopted a uniform standard for analyzing continuing violations. *Compare Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1303 (8th Cir. 1997) (holding that when a plaintiff alleges an ongoing practice or pattern of discrimination, a continuing violation is present "if the plaintiff established that *any violation* took place" during the statutory period) (emphasis added) *with Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999) (requiring a plaintiff to show "some incident of harassment" occurring within the limitations period and a "sufficient nexus" between the incident and the other incidents of harassment), (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995)).

the continuing violation doctrine is appropriate.[8] These courts of appeals—like the Fifth Circuit—consider the third factor, permanence, to be the most important. *See West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 & n. 9 (3d Cir. 1995); *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1415 & n. 6 (10th Cir. 1993); *Bell v. Chesapeake & Ohio Ry.*, 929 F.2d 220, 223-25 (6th Cir. 1991); *Roberts v. Gadsen Mem'l. Hosp.*, 835 F.2d 793, 801 (11th Cir. 1988). The Second Circuit, while not expressly adopting the *Berry* analysis, uses a similar standard to determine whether a continuing violation exists. The Second Circuit asks whether the instances of discrimination are "specific and related" and the plaintiff must be without notice of the discriminatory nature of events when they occur. *See e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 n.4 (2nd Cir. 2000); *Van Zant*, 80 F.3d at 713. The First and Federal Circuits have adopted the Seventh Circuit's *Galloway* approach. *See O'Rourke v. City of Providence*, 235 F.3d 713, 731-33 (1st Cir. 2001); *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir. 1998); *Sabree*, 921 F.2d 399-400; *Bosley v. Merit Sys. Prot. Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998). There is no doubt that under the analyses adopted by any of these courts, Morgan's continuing violation claim would have failed. Not only did Morgan believe himself to be the victim of racial

[8] The District of Columbia Circuit has not explicitly adopted *Berry* or *Galloway*, but cites both analyses with approval. *See Curry v. District of Columbia*, 195 F.3d 654, 661 n.14 (D.C. Cir. 1999) *cert. denied*, 530 U.S. 1215 (2000) (citing *Sabree*, 921 F.2d at 401-02); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483 (3d Cir. 1997); *West*, 45 F.3d at 755-56; *Berry*, 715 F.2d at 981. The Fourth Circuit, likewise, has "never delineated what constitutes a 'continuing violation,'" but it cites with approval to the Fifth and Seventh Circuits' analyses. *Emmert v. Runyon*, No. 98-2027, 1999 WL 253632 at *4 (4th Cir. Apr. 29, 1999). Moreover, the district court for the District of Maryland relies on *Berry* describing it as "[a] useful analysis of the [continuing violation] theory borrowed from the Fifth Circuit but consistent with Fourth Circuit precedent." *Seward v. Harford County*, 2001 WL 283090, at *4 (D. Md. March 13, 2001).

discrimination four years prior to filing his charge, he also complained about racial discrimination to Amtrak's management, Amtrak's internal EEO office and members of Congress.

The Ninth Circuit openly acknowledged the conflict it created between the circuits by adopting its "sufficiently related" standard and explicitly rejecting *Galloway* and *Berry*. App., *infra*, 15a. This conflict has also been recognized by the First Circuit in *O'Rourke* when it reaffirmed its adherence to its own analysis consistent with *Berry* and recognized that "only the Ninth Circuit has taken a different position . . ." 235 F.3d at 731 n.6; *see also Salgado v. City of New York*, 2001 WL 290051, at *6 n.2 (S.D.N.Y. March 26, 2001) (acknowledging conflict). The "inconsistency and confusion" surrounding the continuing violation doctrine will increase exponentially as a result of the Ninth Circuit's decision below. It is time for this Court to intervene and resolve the conflict.

B. The Ninth Circuit's Decision Conflicts With This Court's Rulings on The Continuing Violation Doctrine

The Ninth Circuit's decision also is inconsistent with this Court's precedent regarding the continuing violation doctrine. This Court adheres to the proposition that statutes of limitation are to be strictly enforced. Statutes of limitation have been characterized as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). This Court noted that "[s]tatutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice" of the right to defend himself. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Wood v. Carpenter*, 101 U.S 135, 139 (1879)). Statutes of limitations are "statutes of repose" which balance plaintiffs'

needs for ample time to pursue claims with defendants' and courts' rights to be free of stale claims. *Id.* at 117; *Order of Railway Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965). This Court described the purposes behind statutes of limitations as "promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railway Telegraphers*, 321 U.S. at 348-49.

This Court repeatedly has recognized that Title VII's limitations period facilitates the delicate balance between the interests of the employee in protecting his civil rights, the societal interest in promoting prompt filing of discrimination claims thereby enhancing the likelihood of accurate determinations, and the employer's interest in being protected from untimely claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (noting that limitations periods are "intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights"); *Ricks*, 449 U.S. at 259-60 (noting that "it should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'") (citation omitted); *Evans*, 454 U.S. at 559 (noting that employer is "entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the limitations period.); *Robbins & Myers*, 429 U.S. at 240 (noting that "[a]dherence to the limitations period assures prompt

notification to the employer of a charge of an alleged violation of Title VII . . ."). Thus, this Court expressly has rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e).[9] *Ricks*, 449 U.S. at 257-8; *Chardon*, 454 U.S. at 8; *Evans*, 431 U.S. at 558; *Robbins & Myers*, 429 U.S. at 239-40.

For example, in *Robbins & Myers*, this Court rejected an employee's argument that the Title VII limitations period was tolled during the pendency of a grievance procedure challenging her allegedly discriminatory and unfair termination. *Robbins & Myers*, 429 U.S. 229. The employee filed a grievance pursuant to the applicable collective bargaining agreement two days after her termination challenging it as "unfair." However, she waited until after the grievance procedure was complete and after the Title VII limitations period had run to file her charge with the EEOC. *Id.* at 231-32. In arguing that Title VII's statutory limitations period should be tolled during the pendency of grievance/arbitration proceedings, the employee noted that any delay would be minimal and that failure to permit such tolling might force an

[9] Likewise, this Court has rejected an equitable tolling rule when a plaintiff tried to rely on Title VII to extend the limitations period for his Section 1981 claim. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the plaintiff filed a timely charge with the EEOC alleging race discrimination. More than three years later, the EEOC issued a right to sue letter. Plaintiff filed suit alleging violations of both Title VII and Section 1981. He argued that the one-year limitations period applicable to his Section 1981 claim was tolled during the pendency of the processing of his Title VII claim by the EEOC. This Court rejected plaintiff's arguments and held that the one-year limitations period on his Section 1981 claim had expired. This Court held, "plaintiff has slept on his § 1981 rights. The facts that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent . . . We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466.

employee into court prematurely. This Court, citing its decisions in *Alexander*, 415 U.S. 36 and *Johnson*, 421 U.S. 454, reaffirmed the independence of remedies under a collective bargaining agreement and Title VII and held that:

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight.' *Id.* at 240 (citation omitted).

This Court has also rejected attempts by plaintiffs who knowingly permitted the limitations period to expire to use the continuing violation doctrine to salvage stale claims. As discussed above, the Court rejected the plaintiff's attempt to use the continuing violation doctrine to extend Title VII's limitations period in *Ricks*. *Ricks*, 449 U.S. 252. There the plaintiff argued that the continuing violation doctrine should apply to save his discriminatory denial of tenure claim in part because a number of "unusual incidents"—including an alleged assault by the department chairman—occurred between the denial of tenure and his termination over a year later. *Id.* at 257 n. 8. This Court noted, "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57 (citation omitted). Accordingly, this Court rejected plaintiff's reliance on the continuing violation doctrine and held that his claim was time-barred. *See also Evans*, 431 U.S. 553 (rejecting plaintiff's reliance on continuing violation doctrine to save discriminatory seniority claim where the allegedly discriminatory policy had been discontinued years earlier and plaintiff's claim was based on the current effects of the past policy).

Under the Ninth Circuit's "sufficiently related" test, the plaintiff in *Ricks* would have been able to recover without regard for the limitations period because some act had occurred within the 300 days prior to his filing of the administrative charge. Indeed, in almost every conceivable case, the Ninth Circuit would allow a plaintiff to salvage time-barred claims by relying on the continuing violation doctrine to link untimely claims with timely claims. The Ninth Circuit has rendered Section 706(e)'s limitations period a nullity. The Ninth Circuit's disregard for this limitations period serves none of the meritorious purposes underlying statutes of limitations. It undermines the language of Title VII, the purposes behind Section 706(e)'s limitations period and the delicate balance that is served by statutes of limitations. For all these reasons, the Ninth Circuit's decision is wrong and conflicts with the decisions of this Court and decisions of the other circuit courts of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15374
D.C. No.
CV-96-03585-SYI
OPINION

ABNER J. MORGAN, JR.,
Plaintiff-Appellant,
v.

NATIONAL RAILROAD PASSENGER CORPORATION, dba AMTRAK,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
June 14, 2000—San Francisco, California
Filed November 8, 2000

Before: Donald P. Lay,[1] Dorothy W. Nelson and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Lay

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court and remanded for a new trial. The court held that when an employer's pre-limitations period discriminatory conduct is part of a series or pattern of discrimination, retaliation, and hostile environment, the continuing violation doctrine applies and the pre-limitations period conduct should be presented to the jury for purposes of liability.

Appellant Abner Morgan, an African-American male, applied for a job with appellee Amtrak in 1990. From the date of his hire to his termination five years later, Morgan was subject to numerous disciplinary actions, including written and verbal counselings and suspensions from work without pay, allegedly for rules violations and absenteeism. On several occasions, Morgan requested and was denied career opportunities with Amtrak.

Morgan made numerous complaints to Amtrak's Equal Employment Office and external authorities alleging discriminatory conduct throughout his tenure with Amtrak. Often, Morgan never received an official response to his complaints and an allegedly unrelated discipline was leveled against him within a short period.

In February 1995, after his suspension but prior to his termination, Morgan filed a charge of discrimination against Amtrak with the Equal Employment Opportunity Commission (EEOC). EEOC issued a right to sue letter and Morgan filed suit against Amtrak in federal court alleging violations of Title VII of the Civil Rights Act including discrimination, retaliation and a hostile work environment. Amtrak moved for summary judgment, arguing that it was

entitled to judgment on all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge

The district court granted summary judgment in part to Amtrak, holding that Amtrak could not be liable for conduct that occurred prior to May 3, 1994, because such conduct was outside the 300-day limitations period.

A trial proceeded on the remaining allegations. Morgan presented the testimony of several witnesses, fellow Amtrak employees, who testified about the racially-laden atmosphere at the Amtrak yard where Morgan worked. Evidence was presented that Amtrak supervisors used racial epithets, made racially derogatory comments and performed racially derogatory acts.

The jury returned a verdict in favor of Amtrak. Morgan appealed the district court's grant of summary judgment to Amtrak as to conduct that occurred prior to May 3, 1994.

Before a suit may be filed under Title VII, a plaintiff must file a complaint with the EEOC within 180 or 300 days. Title VII's limitation period limits liability to conduct occurring within the applicable limitations period; the continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred as long as the untimely incidents represent an ongoing unlawful employment practice.

A plaintiff can establish a continuing violation by showing a series of related acts one or more of which are within the limitations period—a serial violation; or by showing a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation.

To survive summary judgment after failing to satisfy the limitations period requirement, Morgan had to raise a genuine issue of disputed fact as to 1) the existence of a continuing

violation, and 2) that the violation continued into the limitations period.

The pre-limitations conduct was sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine. The district court erred in granting a partial summary judgment holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994.

To prove racial discrimination, Morgan had to show that he belonged to a class protected by Title VII, was qualified for the position in question, and suffered an adverse employment action. The incidents of questionable disciplines and counselings, and denied career opportunities, taken together with the abundant evidence of the racially discriminatory atmosphere at the yard were sufficiently related to the alleged incidents of discrimination that occurred within the limitations period. These incidents revealed a consistent pattern of similar employment actions over the entire five-year employment period, perpetuated by the same core group of managers.

The pre-and post-limitations period incidents involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers. In light of this, there was sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim.

To establish a prima facie case for retaliation, a plaintiff must show: he has engaged in a protected activity; he has suffered an adverse employment decision; and there was a causal link between the protected activity and the adverse employment decision.

The pre-limitations conduct was sufficiently related to the conduct within the limitations period so that the continuing

violation doctrine worked to allow a jury to find liability on Morgan's retaliation claim.

Viewed in the context of the totality of Morgan's relationship with Amtrak, the pre-limitations events were part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure. In light of the relatedness of the incidents, Morgan sufficiently presented a genuine issue of disputed fact as to whether a continuing violation existed. Pre-limitations period conduct should have been presented to the jury not merely as back-ground information, but also for purposes of liability.

COUNSEL

Pamela Y. Price, Price and Associates, Oakland, California, for the plaintiff-appellant.

Kay M. Long-Martin and Theodora R. Lee, Littler Mendelson, Oakland, California, for the defendant-appellee.

OPINION

LAY, Circuit Judge:

Abner J. Morgan, Jr. (Morgan) filed suit against National Railroad Passenger Corporation (Amtrak), alleging violations of Title VII of the Civil Rights Act of 1964, as amended in 1991. *See* 42 U.S.C. § 2000e *et seq.* (Title VII). Morgan claims that, because of his race, he suffered discrimination and retaliation, and endured a hostile work environment. The district court granted partial summary judgment in favor of Amtrak, holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994. A trial was held on the remaining allegations, and the jury returned a verdict in favor

of Amtrak. Morgan now appeals both the ruling on summary judgment and the judgment rendered on the jury verdict.

With regard to the grant of partial summary judgment, Morgan argues the district court erred in limiting the liability time frame. As to the judgment on the jury verdict, Morgan asserts the district court erred in four ways: 1) instructing the jury that evidence of pre-limitations period conduct was for "background" or "context" only; 2) excluding certain testimony by Morgan and co-workers regarding the racially hostile environment;[2] 3) improperly instructing the jury on the hostile environment claim; and 4) imposing improper time limits on the presentation of Morgan's case.[3] We find the district court erred in entering judgment as a matter of law. Thus, we reverse and remand for a new trial.

I. BACKGROUND

A) *Factual Background*

Morgan, an African-American male, alleges that from the beginning of his employment with Amtrak, and throughout his tenure, he was subjected to discriminatory and retaliatory acts and endured a racially hostile work environment. He alleges that the managers at the Oakland Maintenance Yard (the Yard), specifically, Robert Vandenburg, Ray Borge, Jerry Denton, Earl Geske, and Mike Bordenave, primarily perpetrated the acts. As we must, we construe the facts in the light most favorable to Morgan.

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[2] The district court excluded portions of testimony by Morgan and Mary Fontaine, and it excluded all of Joe George's testimony.

[3] At trial, Morgan's first witness was to be Joe George; however, as noted *supra*, the district court excluded his testimony in its entirety. Morgan's attorney requested a continuance to prepare Morgan, who was to be the next witness. The court indicated that if a continuance was granted, time would be deducted from the overall time allotted for the case. Morgan took the stand immediately.

1) Incidents Prior To the Limitations Period

Morgan applied for a job with Amtrak in 1990. Although trained and experienced in electrical work, Morgan began working in August 1990 as an "Electrician Helper." Morgan asserts he believed he was being hired as an electrician, from the beginning he performed the work of an electrician, and that less qualified Caucasians were hired as electricians. Morgan is the only person ever hired as a "helper" at the Yard. Eventually, Morgan's position was reclassified and his pay brought in line with that of electricians in April 1992.

In February 1991, Vandenburg and Denton instructed Morgan to attend a meeting in Vandenburg's office. Fearing the meeting might lead to disciplinary action because he had recently called in sick, Morgan refused to attend without union representation.[4] Vandenburg and Denton then charged Morgan with a Rule L violation for refusing to follow orders and attend the meeting.[5] Following a hearing, Morgan was terminated for this violation. Morgan filed a grievance and, in response, Amtrak reinstated him, reducing the termination to a suspension and paying him for all but ten days. Amtrak's Inspector General testified at trial that this ten-day suspension was the most severe discipline imposed on an employee from 1989-1992.

In August of 1991, Morgan made a written request to Amtrak's Los Angeles personnel office asking to participate in Amtrak's apprenticeship program. Within days of filing

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[4] Under the collective bargaining agreement in place at the time, Amtrak employees had a right to union representation at meetings which might lead to disciplinary action.

[5] Rule L prohibits insubordination and provides in relevant part, "[e]mployees must obey instructions, directions and orders from Amtrak supervisor personnel and officers, except when confronted by a clear and immediate danger to themselves, property or the public. Insubordinate conduct will not be tolerated."

such request, Vandenburg told Morgan he stood "a snowball's chance in hell of becoming an electrician" at his yard. He never received a written response from Amtrak's Los Angeles office.[6]

In early October 1991, Morgan sent a letter complaining of race discrimination to Amtrak's Equal Employment Office (EEO) and copied it to his congressperson. Morgan never received a formal response to this complaint from Amtrak. On October 16, 1991, Denton gave Morgan a written counseling for violating Rule L because he ignored a direct order to desist while helping an escorting officer pack a co-worker's belongings. Morgan immediately protested this counseling, alleging that it was racially motivated.

In the fall of 1991, Morgan and other employees met with their congresswoman to complain about conditions at the Yard. Shortly after this meeting, on December 13, 1991, Vandenburg placed a letter of counseling in Morgan's file, accusing him of being argumentative and threatening. Early in 1992, the congresswoman contacted Amtrak regarding the employee complaints. In response, Amtrak's Inspector General conducted an investigation of the Yard. Amtrak insists that a list of primary concerns was then drafted and improvements made. At trial, however, Amtrak's EEO representative responsible for the Yard during the relevant time period denied knowledge of the investigation.

On September 17, 1992, Vandenburg and Borge counseled Morgan for alleged absenteeism. Morgan contends that the charged absenteeism included several months of previously approved leave, which had been granted so that he could care for his son.

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[6] Amtrak insists that Morgan was scheduled to go through the program the following year but the program was discontinued prior to his admission.

On September 19, 1992, Mike Fabian, an Amtrak foreman, ordered Morgan to clean up tar on one of the tracks. This work was outside of Morgan's job description. Then, on November 29, 1992, Morgan was again assigned a task outside his craft, specifically, Geske assigned him the task of picking up tie wraps.[7] Morgan asserts that he picked up as many tie wraps as possible during his shift, but he could not possibly pick up all of them. Regardless, on December 1, 1992, Geske gave Morgan a written counseling for a Rule L violation for failing to pick up all of the tie wraps.

In April 1993, Morgan received another written counseling from Denton for absenteeism. This counseling targeted Morgan's tardiness and attendance on three days—including one excused absence. This counseling occurred despite a recommendation from Amtrak's Inspector General that management should not be strict with regard to minor absenteeism.

In May 1993, Morgan requested, first verbally and then in writing, a one-day leave of absence, in addition to the eight days of vacation for which he was scheduled. Vandenburg denied the requests. Morgan did not appear at work on the day in question. As a result, Morgan was charged with a Rule L violation and suspended for fifteen days. Morgan filed a letter of complaint with Amtrak's EEO office and his union. Eventually, Morgan received back pay and the suspension was ordered expunged from his file.

On May 25, 1993, Morgan asked Vandenburg, in writing, why his name was removed from the list of employees scheduled to be trained on heating, air, and ventilation systems. On that same day Morgan filed a written complaint with Amtrak's EEO office alleging ongoing racial discrimination and retaliation. Then on May 30, 1993,

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[7] Amtrak asserts everyone was assisting in a general cleanup in preparation for an audit; however, no other employee testified to having to perform these specific tasks on the same occasion.

Morgan filed another written complaint with Amtrak' s EEO office.

In September 1993, Vandenburg received a letter requesting an investigation of an alleged conversation during which Morgan made improper comments to a union representative. A preliminary investigation confirmed that a conversation had occurred.[8] Morgan, however, would not discuss the incident with Vandenburg and instead asked for a formal investigation. In October 1993, Morgan was charged with violating Rules F-1 and F-3.[9] After an investigatory hearing, the charges against Morgan were dropped and the incident ordered expunged from his record.

During a training session in October 1993, Vandenburg physically touched Morgan. The contact consisted of Vandenburg approaching from behind, placing his hands on Morgan's shoulders, pushing down, and whispering in his ear. Interpreting the contact as an assault, Morgan reported the incident to the Southern Pacific police, the Oakland police, and filed a written complaint with Amtrak's EEO office. Morgan asserts that Amtrak did not investigate or respond to the situation.

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[8] The conversation between Morgan and the union representative was overheard by another employee. Apparently, this employee's recollection initially supported the union representative's position but later changed to corroborate Morgan's version. At trial the employee testified that a number of supervisors pressured him to change his statement to support the union representative. Specifically, he testified that Vandenburg stated, "Abner was a problem employee, and that they were going to fire him anyways [sic]."

[9] Rule F governs employee conduct. Rule F-1 states: "All employees are required to conduct themselves in a courteous and professional manner in dealing with the public and other Amtrak employees. Boisterous conduct or horseplay and profane or vulgar language are prohibited." Rule F-3 states: "Conduct involving dishonesty, immorality, or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism and loss of goodwill."

In December 1993, Morgan's scheduled training was cancelled. In January 1994, Morgan wrote a letter to Amtrak's EEO complaining of such cancellation. Morgan asserts that Amtrak never formally responded.

In January 1994, Morgan called in sick to work for one day. When he returned, Borge and other supervisors required him to produce a doctor's note before he could return to work. Despite the fact a note was not required under Amtrak's sick leave policy, when he could not produce a note Morgan lost three days of pay. After filing a grievance, Amtrak paid Morgan for the lost days, excluding the one sick day.

2) Incidents Within the Limitations Period

On September 2, 1994, Morgan was assigned to work on multiple trains. At the end of his shift Morgan had completed work on only one of the trains. Morgan's immediate supervisor spoke with him about not finishing the work and he was subsequently charged with a Rule L violation for failing to complete work assigned to him. Morgan argues that turning over unfinished work to the next shift was not uncommon. There was an investigatory hearing and Morgan was suspended for fifteen days.[10]

In October 1994, Morgan was again denied training and complained to Amtrak's EEO office regarding the cancellation of such training. He received no response.

In December 1994, Morgan was accused of threatening Bordenave during a meeting. Despite investigation, the allegation was unsubstantiated and no action was taken against Morgan.

On February 4, 1995, Bordenave reported to Denton that Morgan had threatened him. Morgan paints a different picture. He asserts that Bordenave falsely claimed he had

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[10] This suspension was affirmed on appeal to the National Railroad Adjustment Board.

been threatened and that when ordered into Denton's office, he asked for union representation or the presence of a co-worker as a witness. Denton denied both, ordered everyone out of the office, and yelled at Morgan to get his "black ass" into the office. Morgan refused and went home. As a result of the incidents. Morgan was suspended and charged with violations of Rules L and F. An investigatory hearing was held and on March 3, 1995, Morgan was terminated.

3) Overall Environment

Morgan presented evidence from a number of fellow Amtrak employees regarding the racially-laden atmosphere at the Yard. Specifically: 1) Art Conley, a former manager, testified that Borge made racial jokes, used the "n" word, performed racially derogatory acts in front of Vandenburg, and that Vandenburg made negative comments regarding African-Americans' capacity to be supervisors; 2) two African-American Amtrak supervisors testified to Borge's racially offensive conduct; 3) two African-American co-workers testified Denton made racially derogatory comments; 4) a number of other witnesses testified to hearing Denton and Bordenave use racial epithets; 5) Joe George, a former employee, was to testify Vandenburg made racially derogatory comments and referred to him as "boy", and that Geske made racially derogatory statements, including that he would kill his daughter before he would allow her to date a black man; [11] and 6) Mary Fontaine, a former employee, testified to the demeaning manner in which Denton treated African-Americans and to racial slurs she heard.[12]

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[11] As noted *supra*, the district court entirely excluded George's testimony because Morgan had not properly submitted an offer of proof in the pre-trial report and because such testimony was cumulative and more prejudicial than probative.

[12] At trial, the district court excluded two other pieces of Fontaine's testimony. First, the district court excluded testimony of her knowledge of Denton's comment regarding working "niggers to death" because such testimony was hearsay and was more prejudicial than probative. Second, the district court excluded her testimony regarding disparate discipline based on race because it was beyond the scope of the case.

B) *Procedural Background*

On February 27, 1995, after his suspension but prior to his termination, Morgan filed a charge of discrimination and retaliation against Amtrak with the Equal Employment Opportunity Commission (EEOC) and cross-filed with the California Department of Fair Employment and Housing. On July 3, 1996, the EEOC issued a "Notice of Right to Sue" and Morgan filed the instant lawsuit on October 2, 1996. Amtrak filed a Motion for Summary Judgment, arguing in part that it was entitled to judgment on all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge.[13]

On September 11, 1998, the district court granted in part Amtrak's Motion for Summary Judgment, holding that Amtrak could not be liable for conduct that occurred prior to May 3, 1994, because such conduct was outside the applicable 300-day limitations period. The district court went on to find that Morgan had raised a genuine issue of material fact sufficient to proceed to trial on a number of his timely filed claims. A trial proceeded on the remaining allegations,[14] and the jury returned a verdict in Amtrak's favor on November 19, 1998. This appeal ensued.

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[13] Title VII actions cannot proceed in federal court unless a charge of discrimination is first filed with the EEOC. Generally, a complaint must be filed within 180 days of the alleged unlawful employment practice. If a plaintiff initially institutes proceedings with an appropriate state agency, however, the deadline is extended to 300 days. *See* 42 U.S.C. § 2000e-5(e)(1). The parties in this case agree that the applicable limitations period is 300 days.

[14] Specifically, the district court found Morgan had raised a genuine issue of material fact regarding his September 1994 suspension, the October 1994 cancellation of training, his February 1995 suspension, and his termination.

II. DISCUSSION

This court reviews a district court's grant or denial of a motion for summary judgment *de novo*. *See Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999). The question of whether the pre-1994 claims are time barred is a question of law reviewed *de novo*. *See Bouman v. Block*, 940 F.2d 1211, 1218-19 (9th Cir. 1991). In reviewing an order denying or granting summary judgment, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See Robi*, 173 F.3d at 739.

Morgan argues that the conduct delineated above, including those incidents dating back to the beginning of his employment, constitutes a violation of his Title VII rights. The district court granted partial summary judgment, holding that all claims arising from occurrences prior to May 1994 were time barred.

A. *Continuing Violation Theory*

As noted *supra*, before a suit may be filed under Title VII, a plaintiff must file a complaint with the EEOC within 180 or 300 days. *See* 42 U.S.C. §2000e-5(e)(1). Title VII's limitation period limits liability to conduct occurring within the applicable limitations period; the continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred "as long as the untimely incidents represent an ongoing unlawful employment practice." *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999); *see e.g., Draper V. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir. 1998). In limiting the time frame to events taking place after May 3, the district court relied on *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). In *Galloway*, the Seventh Circuit held the continuing violations doctrine does not apply "unless it would have been unreasonable to expect the plaintiff to sue before the statute

ran on that conduct." *Id.* at 1167. Relying on *Galloway*, the district court concluded that "[b]ecause Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts. before the limitations period on these claims ran."

The district court's reliance on *Galloway* was mistaken. This court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine; in fact, in *Fiedler v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), we explicitly rejected such an approach from the Fifth Circuit. *See id.* at 987 n.10. *Fiedler* examined *Berry v. Board of Sup'rs of L.S.U.*, 715 F.2d 971 (5th Cir. 1983), a case which involved equal pay based upon gender discrimination, where the Fifth Circuit created a multi-factor test for determining whether discrete acts of harassment are closely related enough to satisfy the continuing violation theory. The *Berry* court's final factor, "perhaps of most importance," asked whether the harassing act "should trigger an employee's awareness of and duty to assert his or her rights." *Berry*, 715 F.2d at 981. We rejected the *Berry* analysis, holding that test was not "applicable in determining the continuation of a hostile environment." *Fiedler*, 218 F.3d at 987 n.10.

Indeed, this court's decision in *Fiedler*, as well as *Anderson* and *Draper*, precludes such a notice limitation on the continuing violation doctrine. In *Fiedler*, for example, plaintiff filed suit in mid-1995, after being subject to a pattern of harassing behavior stretching back to 1991. *See Fiedler*, 218 F.3d at 977, 983. Even though the harassing behavior was such that a reasonable person would have been on notice that her rights were violated,[15] we held that the continuing

[15] For example, plaintiff in *Fiedler* told her harasser in 1991 to "stop touching her and that if he continued, she would obtain legal counsel and

violation doctrine applied. *See id.* at 988. Likewise, in *Draper*, plaintiff began employment in November of 1992, and began suffering harassment shortly thereafter. *See Draper*, 147 F.3d at 1105. Even though she brought her harassment claim in mid-1995, we held:

> [b]ecause [plaintiff's] hostile work environment claim is not based upon a series of discrete and unrelated discriminatory actions, but is instead premised upon a series of closely related similar occurrences that took place within the same general time period and stemmed from the same source, her allegations set forth a claim of a continuing violation.

Id. at 1108. Finally, *Anderson* involved a similar situation. In *Anderson*, we applied the continuing violation doctrine where plaintiff filed suit in 1994 after experiencing harassment stretching back to 1986. *See Anderson*, 190 F.3d at 936-37. Based on this circuit's decisions in *Fiedler*, *Anderson*, and *Draper*, this court rejects the rigid test of both *Galloway* and *Berry*.

According to *Fielder*, a plaintiff can establish a continuing violation in one of two ways. First, by showing a series of related acts one or more of which are within the limitations period—a serial violation. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. *See id. See also Green*, 883 F.2d at 1480-81. Precedent makes clear that the alleged incidents of discrimination cannot be isolated, sporadic, or discrete, *see Draper*, 147 F.3d at 1107-10. In *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990), this court found a sufficient relationship where the acts were "*plausibly related* as acts of discrimination against Sosa

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pursue a claim against him." *See Fiedler*, 218 F.3d at 977. Further, she obtained counsel in 1993 to deal with the hostile work environment.

because of his identification as a Mexican-American." (emphasis added).

The second way to establish a continuing violation is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation. *See id.* Systemic violations involve "demonstrating a company wide policy or practice" and most often occur in matters of placement or promotion. *Green*, 883 F.2d at 1480.

B. *Application of Continuing Violation to Morgan's Title VII Claims*

To survive summary judgment after failing to satisfy the limitations period requirement, Morgan must raise a genuine issue of disputed fact as to 1) the existence of a continuing violation—be it serial or systemic, and 2) that the violation continued into the limitations period. *See Fielder*, 218 F.3d at 983. In applying the first prong, the *Fielder* court noted, "[s]o long as the conduct has the capacity of being considered [a violation], it becomes an issue for the fact finder." *Id.* at 986. With regard to the second prong, this court looks to see whether the acts during the period "involve the same type of discrimination as those committed before the period. We must inquire whether there is a common type of discrimination, such as [racial] harassment, or if there is a common kind of employment action, such as repeated denial of a promotion." *Id.*

Morgan alleges three distinct Title VII claims, each which have different legal elements; consequently, "[w]e consider the allegations with respect to each theory separately, in determining whether any of the events underlying these claims occurred within the relevant period of limitations." *Draper*, 147 F.3d at 1108. Thus, we analyze Morgan's claims of discrimination, hostile environment, and retaliation

discretely.[16] In light of the totality of the circumstances, we are satisfied that the pre-limitations conduct at issue in this case is sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine. We hold that the district court erred in granting a partial summary judgment holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994.

i) Discrimination

To prove racial discrimination, Morgan must show that he 1) belonged to a class protected by Title VII, 2) was qualified for the position in question, and 3) suffered an adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The alleged pre-limitations discriminatory conduct which Morgan points to includes: 1) numerous questionable disciplines and counselings (the February 1991 Rule L violation and termination which was eventually reduced to a suspension, the September 1992 counseling for absenteeism, the December 1992 counseling for his failure to pick up tie wraps, the April 1993 counseling for absenteeism, the July 1993 suspension which was later ordered expunged, the October 1993 rule violation, of which Morgan was eventually found not guilty, and the January 1994 improper withholding of pay for failure to produce a doctor's note), and 2) numerous instances in which Amtrak denied him career opportunities (his 1990 hiring as an electrician helper, the 1991 application to Amtrak's apprenticeship program, the May 1993 removal of Morgan's name from training, and the December 1993 cancellation of training). We find that these incidents, taken together with the abundant evidence from other employees and management regarding the racially discriminatory atmosphere at the Yard

[16] We note, however, that the evidence of each alleged violation significantly overlaps, and segregating them is both a difficult and artificial task.

are "sufficiently related" to the alleged incidents of discrimination that occurred within the limitations period. These incidents reveal a consistent pattern of similar employment actions (e.g., discipline and denial of professional training) over the entire five-year period of employment, perpetrated by the same core group of managers. Such incidents are not discrete or isolated. We are satisfied that the pre-limitations period is closely enough related to the acts occurring during the limitations period to trigger the operation of a continuing violation theory on Morgan's claim of racial discrimination.

ii) Hostile Environment

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Draper*, 147 F.3d at 1108 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)). As this court noted in *Fielder*, "[m]ost instances of hostile environments are not capable of facile identification. '[I]nstead, the day-to-day harassment [is] particularly significant, both as a legal and a practical matter, in its cumulative effect.'" *Fielder*, 218 F.3d at 985 (quoting *Draper*, 147 F.3d at 1108).

Evidence of the Yard's pre-limitations period hostile environment includes the decision to hire Morgan at a lower grade than others, Morgan's multiple disciplines and denial of training, the use of racially derogatory language, and the over-all racially-laden environment. We note that the jury, when commenting on the verdict, stated that it had found "evidence of a hostile work environment at the Oakland Yard during May 1994 and February, 1995" but found there was insufficient evidence to establish it was severe and pervasive. This court finds the pre-and post-limitations period incidents involve the same type of employment actions, occurred relatively frequently, and were perpetrated by the same

managers. In light of this, we find sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim.

iii) Retaliation

To establish a prima facie case for retaliation, plaintiff must show: 1) he has engaged in a protected activity; 2) he has suffered an adverse employment decision; and 3) there was a causal link between the protected activity and the adverse employment decision. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). Morgan presented evidence of his numerous complaints to Amtrak's EEO office, as well as the complaints he made to external authorities, regarding the racially hostile environment in the Yard. Further, the evidence reveals that while Morgan often did not receive an official response, an allegedly unrelated discipline was inevitably leveled against him within a short period. Specifically, on October 4, 1991, Morgan filed a complaint with Amtrak's EEO office and on October 16, he received a written counseling for a Rule L violation; in the fall of 1991, Morgan and others met with their congresswoman and discussed concerns about discrimination and in December 1991, a letter of counseling was placed in Morgan's file; in May 1993, he filed a race discrimination complaint with Amtrak's EEO office and within days Morgan asserts that his shift was changed.

As was noted above, the same players were involved in each of these incidents, and the incidents demonstrate a regular pattern of potentially retaliatory conduct throughout Morgan's tenure. We find that the pre-limitations conduct is sufficiently related to the conduct within the limitations period and, thus, hold the continuing violation doctrine works to allow a jury to find liability on Morgan's retaliation claim.

III. CONCLUSION

When the pre-limitations events in this case are viewed in the context of the totality of Morgan's relationship with Amtrak, it is apparent that they are part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure. In light of the relatedness of the incidents, we find that Morgan has sufficiently presented a genuine issue of disputed fact as to whether a continuing violation existed. Thus, we hold that pre-limitations period conduct should have been presented to the jury not merely as background information, but also for purposes liability. Accordingly, we reverse and remand for a new trial.

In light of our ruling, we need not specifically rule on the evidentiary issues raised by Morgan; however, because these issues may arise again on retrial, we voice a general comment. We note that one of the main issues in a hostile environment or discrimination case is the pervasiveness of of the conduct at issue. In this case, the district court excluded significant pieces of information regarding such environment, specifically, portions of Morgan and Fontaine's testimony and the whole of George's testimony. This evidence went to the overall environment of the Yard. This court has previously recognized that an employer's conduct tending to demonstrate its general hostility towards a group is both relevant and admissible. *See Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995). *See also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) (noting that "[a]s a general rule, the testimony of other employees about their treatment by the defendant [employer] is relevant to the issue of the employer's discriminatory intent.") We further note that, in returning the verdict, the jury expressed concern about the overall environment at the Yard. The jury commented:

> We find the management at the Oakland Yard during the time of Mr. Morgan's employment to have engaged in grossly unprofessional & questionable ethical conduct. Most especially, the EEO office of Amtrak was woefully remiss in following up & supervising its recommendation for procedural changes at the Oakland facility, and their general sincerity questionable.

The testimony of Morgan and his co-workers goes to the pervasiveness of the conduct at issue. On retrial, we encourage the district court, when ruling on admissibility of evidence, to consider all evidence in light of its relevance to whether the defendant's conduct may be considered severe and pervasive.

We vacate the grant of partial summary judgment, as well the judgment on the verdict, and we grant a new trial on the overall issues of discrimination, hostile environment, and retaliation.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan 22, 2001]

No.99-15374
D.C. No. CV-96-03585-SYI

ARNER J. MORGAN, JR.,
Plaintiff-Appellant,
v.

NATIONAL RAILROAD PASSENGER CORPORATION, dba AMTRAK,
Defendant-Appellee.

ORDER

Before: LAY[1] and D.W. NELSON, Senior Circuit Judges and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judges Lay and Nelson so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Sep 11 1998]

No. C 96-3585 SI

ABNER J. MORGAN, JR.,
Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
d.b.a. AMTRAK and Does 1-10,
Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

On August 28, 1998, this Court heard argument on a motion for summary judgment filed by defendant National Railroad Passenger Corporation ("Amtrak"). Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS in part and DENIES in part defendant's motion for summary judgment.

INTRODUCTION

Plaintiff Abner J. Morgan, Jr. ("Morgan") filed this Title VII race discrimination suit against defendant Amtrak alleging that from 1990 to 1995 Morgan was consistently harassed and disciplined more harshly than other employees on account of his race. Morgan is African-American. Presently before the Court is Amtrak's motion for summary judgment. Amtrak argues that it is entitled to summary judgment because (1) some of the incidents of alleged discrimination are time-barred in that they occurred more

than 300 days before Morgan filed his charges of discrimination with the Equal Employment Opportunity Commission ("EEOC")[1]; (2) some of the incidents are not exhausted in that they were not specifically mentioned in Morgan's EEOC complaints; and (3) all of Morgan's discrimination and retaliation claims fail either because Morgan cannot state a *prima facie* case, or because Amtrak had legitimate, nondiscriminatory reasons for disciplining and ultimately terminating Morgan. Morgan opposes Amtrak's motion, arguing that all of his claims are properly before the Court, and that he has raised triable issues of material fact regarding these claims sufficient to defeat summary judgment.

BACKGROUND

I. Factual Background[2]

A. Untimely Claims: 1990 to May 2, 1994

Morgan began working for Amtrak in August 1990 as an electrician's helper at the Oakland Maintenance Yard ("Yard"). Morgan asserts that when he was hired he believed he was being hired as an electrician, not as an electrician's helper, and that similarly qualified and less qualified Caucasian electricians were hired as electricians at a higher rate of pay. Morgan does not submit any evidence in support of this assertion. Morgan asserts that it was only after several months of working at the Yard that he realized he was not an electrician and that despite performing the duties of an electrician, for at least a year, Morgan's position was not reclassified and his pay was not increased until April 1992 following a lengthy union grievance. Morgan also claims that

[1] Morgan's EEOC complaint was cross-filed with the Department of Fair Employment and Housing, and accordingly the relevant statutory period is 300 days.

[2] The following statement of facts is derived from both parties' papers.

he was the only person ever hired by Amtrak as an electrician's helper at the Yard.

During the period of Morgan's employment with Amtrak, Robert D. Vandenburg ("Vandenburg") was the Facility Manager at the Yard. Morgan claims that throughout his employment with Amtrak he was subjected to a pattern and practice of racially discriminatory acts, followed by retaliatory acts after he complained about discrimination. Morgan alleges that the discrimination and retaliation were perpetrated primarily by the same managers, including Vandenburg, Jerry Denton ("Denton"), Mike Bordenave ("Bordenave"), Ray Borge ("Borge"), and Earl Geske ("Geske").

On February 25, 1991, Vandenburg and Denton charged Morgan with a violation of Rule L[3] for refusing to come to a meeting without a union representative.[4] Amtrak employees have a right to union representation when they are required to

[3] Rule L of Amtrak's Rules of Conduct provides:

> Employees must obey instructions, directions, and orders from Amtrak supervisory personnel and officers except when confronted by a clear and immediate danger to themselves, property, or the public. Insubordinate conduct will not be tolerated.

Declaration of Louis G. Bellotti, Exh. D at 6.

[4] According to Amtrak, when an Amtrak employee is accused of violating a disciplinary rule, the employee is given a letter notifying him of the charges against him and of the date set for an investigatory hearing. An investigatory hearing is then conducted by an Amtrak Hearing Officer for the purpose of determining whether the employee has violated the rule as charged. The Hearing Officer takes testimony from witnesses and receives exhibits. If the Hearing Officer decides that the employee did not violate the rule, no further action is taken. If the Hearing Officer decides that the rule was violated, however, the Hearing Officer's decision is then forwarded to the head of the department in which the employee works. The department head determines what discipline should be imposed. *See* Declaration of Carlos R. Henandez, ¶ 2; Declaration of Joseph W. Deely, Exh. B; Declaration of Gerald T. Mescall, Exh. B.

attend a meeting that might lead to disciplinary action; Morgan believed that the February 25, 1991 meeting might lead to disciplinary action because he had called in sick the previous evening, and accordingly refused to attend the meeting without representation. On March 22, 1991, Amtrak terminated Morgan for the alleged Rule L violation. After Morgan filed a grievance, Amtrak reinstated him and reduced the termination to a 10 day suspension.

On August 13, 1991, Morgan filed a written request to Amtrak's personnel office in Los Angeles for admission to Amtrak's apprenticeship program. Morgan alleges that Amtrak did not formally respond to his request, but that Vandenburg informed him that *he* ran the Yard, and that Morgan stood a "snowball's chance in hell of becoming an electrician." *See* Amended Declaration of Abner J. Morgan, Jr., ¶ 10.

On October 4, 1991, Morgan filed a complaint for race discrimination with Amtrak's Equal Employment Opportunity ("EEO") office. Morgan states that he never received a formal response to his complaint. Two weeks later on October 16, 1991, Denton gave Morgan a "written counseling" for allegedly violating Rule L by helping a co-worker pack up his belongings after he was fired. Morgan states that he protested in writing that the counseling was racially motivated. On December 13, 1991, Vandenburg placed a letter of counseling in Morgan's work file, allegedly without Morgan's knowledge, accusing Morgan of being argumentative and threatening.

On September 17, 1992, Vandenburg and Borge counseled Morgan for alleged absenteeism. According to Morgan, Vandenburg acknowledged that Morgan's absenteeism was in part due to Morgan's taking time off to care for his son, who had recently attempted to commit suicide. *See* Morgan Decl., ¶ 17.

On December 1, 1992, Geske gave Morgan a written counseling for allegedly violating Rule L for failing to pick up "tie wraps"[5] during his shift. Morgan states that although picking up tie wraps was outside of his craft and not in his job description, he nevertheless picked up as many tie wraps as possible during his shift and stopped only when it became too dark to see. Morgan states that when he asked Geske why he was being charged with a Rule L violation, Geske replied that he was only doing what "they" told him to do, and that Vandenburg gave him the order.

On April 26, 1993, Denton issued Morgan a written counseling for alleged absenteeism. On May 13, 1993, Morgan requested a shift change in order to take care of his son while his family went on a trip to Boston. Alternatively, Morgan requested a one day leave of absence in addition to eight days of vacation. Morgan asserts that he was entitled to take leave based on his seniority, but that Vandenburg denied both requests.

On May 21, 1993, Morgan questioned why his name was taken off a list of employees scheduled for training on heating, air and ventilation systems. According to Morgan, Vandenburg told him that he did not have the mental capacity for such training. Morgan has submitted deposition testimony of Elwood Conley, a former Amtrak foreman who was terminated in 1992, who testified that Vandenburg commented to him that African-Americans were less intelligent than Caucasians, and that Vandenburg "didn't want too many blacks because of . . . problems." *See* Declaration of Pamela Price, Exh. H at 14-23

On May 25, 1993, Morgan filed another written complaint with Amtrak's EEO office regarding alleged ongoing racial discrimination he was experiencing at the Yard. According to

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[5] According to Morgan, tie wraps are small pieces of wire like the ties used on plastic bread loaf wrappers.

Morgan, three days later his job was "abolished" and he was reassigned to the graveyard shift. Morgan does not explain exactly how his job was "abolished." On May 30, Morgan filed another written complaint with Amtrak's EEO office.

On July 14, 1993, Morgan was charged with a violation of Rule O[6] and suspended for 15 days for taking an extra vacation day with his family in May. Following a lengthy union grievance, Amtrak settled the dispute in November 1994, and Morgan received back pay. The suspension was ordered expunged from his file, although Morgan alleges that Vandenburg did not comply with the expungement order.

On October 13, 1993, Morgan was charged with Rule F-1[7] and F-3[8] violations for allegedly making improper remarks to a union representative, Henry Bios, in July 1993. An investigatory hearing was held in December 1993 at which Morgan was found not guilty of the charges, and according to Morgan all mention of the matter was ordered expunged from his file. Morgan-alleges that Vandenburg did not comply with the expungement order.

The conversation between Morgan and Rios was overheard by another Amtrak employee, Kenneth Phillips. Although the record is somewhat unclear on this matter, it appears that Phillips initially substantiated Rios' version of events, and then sometime later changed his account so that it corroborated Morgan's. Morgan alleges that after Phillips changed his account, Vandenburg and other managers

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[6] The parties have not provided the Court with the text of Rule O.

[7] Rule F-1 states: "All employees are required to conduct themselves in a courteous and professional manner in dealing with the public and other Amtrak employees. Boisterous conduct or horseplay and profane or vulgar language are prohibited."

[8] Rule F-3 states "Conduct involving dishonesty, immorality or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism or loss of goodwill."

pressured Phillips to lie and say that Morgan acted improperly. In support, Morgan has submitted the deposition testimony of Ken Phillips, in which he states he was called to Vandenburg's office, and that Vandenburg, Denton, Geske, and Louis Bellotti spoke to Phillips about the incident. Phillips was asked if Morgan had threatened him, and if that was the reason why Phillips had changed his account and was now lying about the incident. Phillips testified that he reassured them that he was not lying and that he in fact did not know Morgan. Phillips then testified that Vandenburg asked the other managers to leave, and that once Phillips and Vandenburg were alone, Vandenburg stated that "Abner is going to be fired anyways[sic]," and "I need you to change your story so we can fire Abner." According to Phillips, Vandenburg offered to "protect" Phillips if he changed his story, and that if Phillips changed his story "great things" could happen for Phillips at Amtrak. *See* Price Decl., Exh. M at 58:8-60:19.

Morgan alleges that on October 14, 1993 Vandenburg assaulted him by placing both of his hands on Morgan's shoulders and forcing his upper torso to his knees. Morgan reported the incident to the police and filed a formal complaint with Amtrak's EEO office. Morgan contends that Amtrak did not investigate his complaint.

In December 1993, Bellotti canceled a training scheduled for Morgan. Morgan complained about the cancellation on January 18, 1994, and alleges that he received no response from Amtrak.

On January 14, 1994, Bellotti and Denton required Morgan to bring a doctor's note for one day's absence due to illness before Morgan could return to work. Morgan contends that this requirement was not included in Amtrak's sick leave policy, and that as a result of Bellotti's and Denton's refusal to allow him to return to work, Morgan lost three day's pay. Morgan appealed the loss of his pay for the three days, and on

June 14, 1994 Amtrak settled the matter by agreeing to pay Morgan for the time he was not permitted to work *See* Price Decl., Exh. D.

B. Timely Claims: May 3, 1994 to February 1995

(1) 15 Day Suspension in September 1994

On September 9, 1994, Morgan was charged with a violation of Rule L for allegedly failing to complete his work assignments on September 2. On September 2, Morgan worked a midnight to 8:00 am shift under the supervision of Luerean Butler Van de Streek. According to Amtrak, Van de Streek assigned Morgan to work all of the cars on train number 702 and the last two cars on train number 704 (cars 53503 and 54013). Morgan completed his work on train number 702, and that train left on time at 6:30 am. At 6:45, in the presence of Earl Geske, Van de Streek reminded Morgan that he needed to work the last two cars on train number 704. Geske was Van de Streek's direct supervisor. Morgan did not complete the work on these cars, and Van de Streek gave Morgan an "oral counseling" on the matter. After the oral counseling, Borge charged Morgan with a violation of Rule L for failing to complete his work.

On October 3, 1994, Amtrak held an investigatory hearing on the Rule L charge. The Hearing Officer, Carlos Hernandez, concluded that Morgan was guilty of the charge. Hernandez forwarded his decision to Gerald Thomas Mescall, who was at that time the Mechanical Superintendent for Amtrak's Western Division. Mescall decided to suspend Morgan for 15 days.

Morgan contends that while he was assigned to work on car 53503 on train 704, the other car —number 54013—was assigned to a Caucasian electrician, George Guse. Morgan further contends that although Guse did not complete his work on that car, Guse was never charged with a Rule L violation, or disciplined in any way. *See* Morgan Decl., ¶ 34;

Declaration of Robert Ramirez, ¶ 10. Additionally, Morgan contends that it was Amtrak's policy not to levy charges of rules violations if an oral or written counseling was given to the employee on the matter, and thus after Van de Streek gave Morgan an oral counseling about the allegedly unfinished work the Rule L charge should have never been filed against him.

(2) February 1995 Termination

In December 1994, electrician Robert Craven and foreman Michael Bordenave accused Morgan of threatening Bordenave during a safety meeting. The allegations were not substantiated, and no disciplinary action was taken against Morgan.

On February 4, 1995, Bordenave again accused Morgan of threatening him. The parties present markedly different versions of events. According to Amtrak, on that day Morgan was working the midnight to 8:00 am shift, and his immediate supervisor was Bordenave. At the beginning of the shift, Bordenave gave Morgan his assignments for the evening. Later in the shift, Bordenave asked Morgan about his progress. Morgan ignored the question, announced that he had to "go shit," and walked away. As he walked away, Morgan mumbled profanity. Bordenave confronted Morgan about his inappropriate reaction to Bordenave's question, at which point Morgan stated, "If you keep fucking with me, punk motherfucker, you are going to find out." Bordenave left the area and reported the incident to the General Foreman, Denton. Shortly thereafter, Morgan confronted Bordenave in the lunchroom, stating, "You fucked up. I will be waiting for you outside the gate and you will see how Amtrak protects you now."

Bordenave reported this second incident to Denton. Denton instructed Bordenave and Morgan to report to his office so they could discuss the matter. Morgan refused, stating he would only enter Denton's office if he was accompanied by a

union representative. Denton told Morgan that his representative was not needed because Denton only wanted to discuss the matter. Morgan continued to refuse to enter the office, and walked away. As a result, Denton informed Morgan that he was being removed from service for disobeying a direct order and for threatening a supervisor. Morgan was then instructed to leave the property.

Morgan's version of events is as follows: On February 4, 1995, Bordenave told Morgan that he would falsely claim that Morgan threatened him and that Amtrak's management would believe Bordenave, not Morgan. Morgan states be never threatened Bordenave, and has submitted the declaration of Meriola Gotthardt, a fomer Amtrak employee, which states that Gotthardt heard Bordenave say be would falsely accuse Morgan. *See* Declaration of Meriola Gothardt, ¶ 6. Morgan states that when Denton ordered him to go into his office, he asked for a union representative because he believed that the meeting could lead to disciplinary action. When his request for a union representative was denied, Morgan asked if co-worker Michael Shaw could be a witness to the meeting. Denton responded by ordering everyone to leave the main office, and screamed at Morgan to "get his black ass" into Denton's office. Morgan refused to enter Denton's office without union representation or a witness, and was offended by Denton's remark.

Morgan was formally charged with violating Rule F-2 and Rule L, and an investigatory hearing was held. Hearing Officer John Eschenbach determined that the charges against Morgan were proven, and referred his decision to Joseph W. Deely, the Director of Amtrak's California Corridor. Deely made the decision to terminate Morgan's employment

(3) Denial of Jury Duty Pay

Morgan claims that be was denied pay for jury duty in June 1994, and again in January/February of 1995 in violation of the collective bargaining agreement between Amtrak and the

union. There are few facts in the record regarding the June 1994 jury duty, as Morgan simply alleges that he was not paid for serving and Amtrak does not respond to this allegation. With regard to the 1995 jury duty, Morgan served on January 30, 1995 and February 1, 1995. It is undisputed that Morgan was not entitled to jury duty pay for February 1, because that day was Morgan's regular rest day. However, the parties dispute whether Morgan was in fact ever paid for serving on January 30, 1995.

(4) Cancellation of Training

Morgan alleges that in October 1994 Borge directed Gary Biembom to cancel a scheduled training for Morgan because Morgan had a "bad attitude." The factual record is unclear as to whether the training was in fact canceled.

(5) Denial of Access to Work File

Morgan claims that he made numerous requests to view his work file as early as November 1991, and that Vandenburg continued to deny Morgan's requests up to and including December 1994. Amtrak explains that Amtrak maintains an official "personnel" file and an unofficial "work" file on each employee: in December 1994 the personnel files were maintained by Amtrak's personnel department in Los Angeles, while the work files were kept at the Oakland Yard. Amtrak states that Vandenburg interpreted Amtrak's policy as requiring employee access to their personnel files, but not to their work files, and that based on this understanding, Vandenburg denied Morgan's December 1994 request to view his "work" file. Vandenburg has submitted a declaration stating based on his interpretation of Amtrak policies, it was his general practice not to allow employees to view their work files. *See* Declaration of Robert D. Vandenburg, ¶ 4.

(6) Denial of Union Representation in December 1994

Although Morgan has identified in discovery responses that he believes Amtrak discriminated against him by denying him union representation at a meeting in December 1994, Morgan does not address this allegation in his opposition to Amtrak's motion, nor has Morgan provided any evidence in support of this allegation.

(7) Posting Notice Regarding Grievance/Denial of Bid for Job 515

Morgan alleges that in January 1995, Vandenburg posted a notice at the Oakland Yard "to all concerned" regarding a pending grievance that Morgan had filed regarding his electrician seniority date. Amtrak has submitted evidence that Vandenburg posted the notice because he was directed to do so by the National Railroad Adjustment Board, and Morgan does not dispute this fact. *See* Plaintiff's Amended Separate Statement of Facts # 18.

Morgan also alleges that the denial of his bid for a supervisory position (Job Number 515) was discriminatory because, had his electrician seniority date been set at his initial hiring date in 1990, he would have had the most seniority of all the applicants for the position. However, because Morgan did not become an electrician until 1992, Morgan was not selected, and instead Luerean Butler Van de Streek, an African-American woman, was hired.

2. Procedural Background

On February 27, 1995—after Morgan's suspension but prior to his termination—Morgan filed a charge of discrimination against Amtrak with the EEOC. In his charge, Morgan stated that beginning in 1991 he protested Amtrak's discriminatory treatment of himself and other African-American employees, and that since that time he had been subjected to retaliation. Morgan then identified four

discriminatory and/or retaliatory acts: (1) denial of refrigeration and air conditioning training in October 1994; (2) denial of access to his work record in December 1994; (3) suspension without pay pending the investigation of the charge of threatening his supervisor; and (4) denial of pay for jury duty in February 1995. *See* Complaint, Exh. 1. After Morgan was terminated from Amtrak, he amended his EEOC charge on March 8, 1995 to allege that his termination was discriminatory and retaliatory. On July 3, 1996, the EEOC issued a "Notice of Right to Sue." Morgan filed the instant lawsuit on October 2, 1996.

LEGAL STANDARD FOR SUMMARY JUDGMENT

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, "the burden of production then shifts so that "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 317 (1986)).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus Co. Ltd. v.*

Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. Fed, R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty Inc. v. City of Niagara Falls*, 754 F.2d 49 (2d Cir. 1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See e.g., Fong v. American Airlines, Inc.* 626 F.2d 759, 762-63 (9th Cir. 1980).

DISCUSSION

1. Morgan's Claims Prior to the Limitations Period are Time-Barred

In its motion for summary judgment, Amtrak first argues that it is entitled to judgment as a matter of law on all acts of alleged discrimination which occurred more than 300 days before Morgan filed his complaint with the EEOC. Morgan argues that his allegations of conduct occurring prior to the 300 day period are actionable under the "continuing violations" doctrine.

Under the continuing violations doctrine, "allegations of conduct occurring prior to the limitations period are actionable if the complainant can show that they are part of a series of related acts against the complainant," *Hashimoto v. Dalton*, 118 F.3d 671, 678 (9th Cir. 1997), *cert denied*,— U.S.—, 118 S. Ct. 1803 (1998), and at least one of the allegedly discriminatory acts falls within the limitations period. See *Draper v. Couer Rochester, Inc.*, 1998 WL 340411, at *4 (9th Cir. June 29, 1998) (to be reported at 147 F.3d 1104). However, even if both of these conditions are met, courts have found that allegations of discrimination prior to the limitations period are barred if the allegedly discriminatory act would or should have triggered the plaintiff's awareness of a violation and accompanying duty to

assert his rights *See e.g., Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); *Roberts v. Gadsden Memorial Hosp.* 835 F.2d 793, as modified at 850 F.2d 1549 (11th Cir. 1988); *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). As the Seventh Circuit has noted,

> The most difficult case arises when a long-continued series of harassing acts definitely are a series, a pattern, and not merely a set of discrete events, yet it was evident long before the plaintiff finally sued that she was the victim of actionable harassment. It seems to us that in such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; for she had no excuse for waiting that long.

Galloway, 78 F.3d at 1167. The *Galloway* court then held that "the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Id.*

The factual record clearly establishes that Morgan believed as early as 1991 that Amtrak and its managers were discriminating against him on the basis of his race and retaliating against him for his complaints. For example, on October 4, 1991, Morgan filed a written complaint with Amtrak's EEO office complaining of "blatant racism" at the Oakland Maintenance Yard, and specifically alleging the following acts as discriminatory: (1) the March 22, 1991 termination for a Rule L violation; (2) Amtrak's hiring of Morgan as an electrician's helper rather than as an electrician; and (3) Amtrak's failure to respond to Morgan's request to enter Amtrak's apprenticeship program. *See* Morgan Decl.,

Exh. D. Morgan further states in his declaration that when Denton charged him with a Rule L violation on October 16, 1991, he "protested strenuously" that this action was racially motivated, and complained in writing. *Id.* at ¶ 12. In late 1991, Morgan and other Amtrak employees met with then-Congresswoman Barbara Boxer to complain about discriminatory conditions at Amtrak. *Id.* at ¶ 13. Morgan states that as a result of this meeting, Rep. Boxer contacted Amtrak's General Inspector, Fred Weiderhold, who visited the Yard three times in 1992. Morgan personally met with Weiderhold, and Morgan "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to his attention." *Id.* at ¶ 16. Throughout 1992, 1993 and 1994 Morgan continued to complain to Amtrak of race discrimination. *See* Morgan Decl., Exh G. (Oct. 21, 1993 EEO complaint); Exh. F (Sept. 17, 1992 letter to Weiderhold) Exh. H. (Jan. 18, 1994 EEO complaint).

Statutes of limitations "serve the important purpose of encouraging the prompt filing of claims and by doing so enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities." *Galloway*, 78 F.3d at 1165. In the instant case, Morgan did not file his complaints with the EEOC until February 1995, despite the fact that he believed as early as 1991 that Amtrak was discriminating and retaliating against him. Because Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts before the limitations period on these claims ran. Accordingly, the Court holds that all allegations of discrimination occurring prior to the limitations period are time-barred.[9]

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[9] This holding does not preclude Morgan from presenting evidence of acts that occurred prior to the limitations period if they are relevant to his timely claims of discrimination and retaliation; this holding simply precludes Morgan from recovering damages on these claims.

2. Some Claims Not Specifically Mentioned in the EEOC Charges That Occurred Within the Limitations Period are Actionable

Amtrak next argues that Morgan is limited to litigating only those timely claims that were specifically mentioned in his February and March of 1995 EEOC complaints. In those charges, Morgan listed four matters: (1) the alleged denial of "updated refrigeration and air conditioning training" in October 1994; (2) the alleged denial of access to his work record in December 1994; (3) the alleged docking of his pay for days served on jury duty in February 1995; and (4) the suspension and subsequent termination for threatening and using profanity against his supervisor and general foreman. In addition to these acts of alleged discrimination, Morgan contends in this lawsuit that Amtrak discriminated against him by denying him pay for jury duty in June 1994, suspending him without pay for 15 days in September 1994 for allegedly failing to complete his work assignments, denying him union representation at a meeting in December 1994, posting a notice about a pending grievance in early 1995, and denying Morgan's bid for a job in January 1995.

"The remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally." *Stache v. International Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988), *cert. denied*, 493 U.S. 815, 110 S. Ct. 64 (1989). If a plaintiff files a lawsuit based on incidents not specifically listed in his EEOC charge, a federal court may hear the additional claims if they are "like or reasonably related to the allegations contained in the the EEOC charge." *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990); *accord EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994).

"In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges." *Green v. Los Angeles Cty. Superintendent of Schools*, 883 F.2d 1472, 1476 (9th Cir. 1989). The Court concludes that the additional allegations regarding unpaid jury duty, the 15 day suspension in September 1994, and the denial of union representation at a December 1994 meeting are "like or reasonably related" to the claims Morgan specifically mentioned in his EEOC charges. With regard to unpaid jury duty, Morgan alleges that Amtrak denied him pay for jury duty in violation of Amtrak policy both in June 1994 and in January-February 1995. These claims are virtually identical. As for the September 1994 suspension, Morgan claims that the initiation of the charges against him was discriminatory and retaliatory, the same allegation he levies against the February 1995 charges. In the Court's view, these charges are similar, and accordingly Morgan may pursue these claims in this litigation. Finally, Morgan claim that he was denied union representation at a meeting in December 1994 is "like or reasonably related" to his allegation that he was denied union representation in connection with the February 1995 termination.

However, the Court concludes that Morgan's allegations regarding the posting of a grievance in early 1995 and the fact that Morgan was not selected for job number 515 are not "like or reasonably related" to the allegations contained in his EEOC charges, and accordingly these allegations are not actionable. "Where claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108, 105 S. Ct. 784 (1985). In the view of the Court, Morgan's allegations regarding the posting

of a notice and job number 515 are not so closely related that the EEOC would have investigated these claims in the course of investigating the claims in Morgan's EEOC charges.

In any event, even if Morgan had included these allegations in his EEOC charges, the Court concludes that Morgan has not sustained his burden to defeat summary judgment. As noted earlier, Morgan does not dispute that Vandenburg posted the notice of the pending grievance because he had been directed to do so by the National Railroad Adjustment Board. Accordingly, there is no evidence that the posting of the notice was discriminatory. Moreover, Morgan does not allege that any adverse employment consequences flowed from the posting of the grievance.

With regard to job number 515, Morgan alleges that he should have been awarded the position because, had his seniority date been set when he was first hired as an electrician's helper, rather than when he became an electrician, he would have had the most seniority of all applicants for job number 515. However, because Amtrak did not reclassify Morgan's position until 1992, "the subsequent selection of any of the later-hired electricians for promotions instead of Mr. Morgan is suspect and inherently based on unfair advantage." Plaintiff's Opposition, 23:11-13. Even if this allegation had been contained in Morgan's EEOC charges, it would not withstand summary judgment because Morgan has failed to establish a *prima facie* case of race discrimination. Morgan has not produced any evidence in support of his allegation that "Amtrak hired other less qualified Caucasian Electricians between the beginning of 1991 and April 1992 and paid them at an Electrician's rate." Morgan Decl. ¶ 5. Furthermore, it is undisputed that employee selected for job number 515 was Luerean Butler Van de Streek, an African-American woman. As such, Morgan has failed to offer evidence that "give[s] rise to an inference of unlawful discrimination," a necessary element of

a prima facie case. *Texas Dep't of Community Affairs v. Burdine*, 450 US. 248, 253, 101 S. Ct. 1089, 1094 (1981).

3. Morgan has Raised Genuine Issues of Material Fact with Regard to Some of His Actionable Claims

Amtrak finally argues that it is entitled to summary judgment on Morgan's timely claims because it has provided legitimate, nondiscriminatory reasons for Morgan's September 1994 suspension and February 1995 termination, and because Morgan cannot establish a *prima facie* case of discrimination with regard to his jury duty, work file, denial of training, and denial of union representation claims.

A. September 1994 Suspension

Amtrak asserts that there was a legitimate and nondiscriminatory reason for Morgan's 15 day suspension in September 1994, and that Morgan has failed to produce any evidence of pretext. Amtrak argues that Mescall's decision to suspend Morgan was based upon the Hearing Officer's decision that Morgan had violated Rule L for failing to complete his work assignments. Amtrak argues that Morgan has not shown that the suspension decision was motivated by his race or an intent to retaliate against him, and that its "honest belief" that Morgan violated Rule L entitles it to summary judgment on this claim.

The Ninth Circuit has recently held that in a discrimination lawsuit, once a defendant has articulated nondiscriminatory reasons for the allegedly discriminatory conduct, a plaintiff may rebut this presumption and raise a triable issue of fact to defeat summary judgment in two ways. First, "[w]hen the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Godwin v. Hunt Wesson Inc.*, 1998 WL 547238, at *4 (9th Cir. Aug. 11 1998) (to be published at___F.3d___). Alternatively, "[i]n

those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered movtives were not the actual motives because they are inconsisent or otherwise not believable. Such evidence of 'pretense' must be 'specific' and substantial in order to create a triable issue [of fact] . . ." *Id.* at *5.

In the instant case, Morgan submits the following evidence that Amtrak selectively enforced its rules against Morgan. Robert Ramirez, who from 1990 to 1995 was in charge of filing and processing grievances and representing Amtrak electricians from the Yard at investigatory hearings, has submitted a declaration stating that during that time period no other electricians at the Yard were charged with a Rule L violation. *See* Declaration of Robert Ramirez, ¶ 2. Ramirez represented Morgan in the hearing on the alleged September 1994 Rule L violation, as well as the February 1995 charges. Ramirez states that during the October 3, 1994 hearing, "testimony and evidence showed that Car 54013 [one of the cars Morgan was charged with not completing work on] was not assigned to Mr. Morgan, but was assigned to George Guse, a white Electrician. George Guse was never disciplined for not working on Car 54013." *Id.* at ¶ 10.[10] Morgan has also submitted the deposition testimony of Earl Geske, in which he states that once an employee has been given a written or oral counseling about a matter, the employee is not also charged with a rule violation. *See* Price Decl., Exh. J at

[10] Morgan has submitted other evidence of selective enforcement of rules by Amtrak. Morgan has submitted evidence that a Caucasian electrician was not charged with a Rule L violation for refusing to attend a meeting without his union representative, while Morgan was charged with a Rule L violation for the same offense, *see* Price, Decl., ¶ 12 and Exh. K, and that a Caucasian electrician was not brought up on charges for cursing at his supervisors, while Morgan was charged with a rule violation for such conduct. *See id.* at ¶ 10 and Exh. I.

100:10-26. However, Morgan has submitted evidence that Butler Van de Streek gave him an oral counseling on the matter, but that Morgan was nevertheless brought up on Rule L charges.

Morgan has also submitted the deposition testimony of Elwood Conley, a former Amtrak employee, who testified that Borge, the charging officer, had a habit of referring to African-Americans as "shuffle-butt niggers." *See* Price Decl., Exh. H at 21:14-17. Finally, Morgan has submitted evidence suggesting that since at least July 1993 both Borge and Geske (who testified at the hearing) were intent on getting Morgan fired. Kenneth Phillips, a former Amtrak employee, testified at his deposition that Geske was among a group of managers who attempted to pressure Phillips to lie so that Amtrak could fire Morgan. *See* Price Decl., Exh. M at 58:18-60:9. Gary Biemborn, an Amtrak trainer, testified in his deposition that in October 1994 Borge instructed Biemborn not to provide training to Morgan. *See* Price Decl., Exit F. at 86:16-23.

The above evidence persuades the Court that Morgan has raised a genuine issue of fact as to whether Amtrak's nondiscriminatory explanation for its actions is the true reason or whether it masks discriminatory motives. Amtrak argues that regardless of whether Borge, Geske and other Amtrak employees acted with discriminatory intent, the fact that the hearing officer, Hernandez, and the official who ultimately decided to suspend Morgan, Mescall, acted on a good faith belief that Morgan had violated Rule L, Amtrak is not liable for discrimination or retaliation. In advancing this argument, Amtrak relies primarily on *Elrod v. Sears Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991). In *Elrod*, the Eleventh Circuit found that a plaintiff alleging age discrimination had failed to offer any substantially probative evidence at trial that age more likely than not motivated his discharge. At trial, the defendant, Sears, Roebuck and Company, justified terminating Elrod on the ground that it believed he had

engaged in sexual harassment of numerous female employees. Sears believed so after it conducted a lengthy investigation of charges, and the plaintiff repeatedly acknowledged in writing that he had acted inappropriately. However, at trial Elrod contended that he was innocent of the sexual harassment charges. The Eleventh Circuit held that it was irrelevant whether Elrod was in fact guilty of the sexual harassment charges; rather, what was salient was whether Sears believed that Elrod was guilty of harassment, and if so, if that belief was the reason behind his discharge. Moreover, the court noted that Elrod had not offered any substantially probative evidence that age more likely than not motivated his discharge.

The Court initially notes that *Elrod* is not binding authority in the Ninth Circuit, and that therefore the Court is not required to apply *Elrod* as Amtrak argues. It is unclear whether the Ninth Circuit would adopt the *Elrod* court's analysis. *See Mitchell v. Keith*, 752 F.2d 385, 388-89 (9th Cir.), *cert. denied, General Motors Corp. v. Mitchell*, 472 U.S. 1028, 105 S. Ct. 3502 (1985) ("It is the law of this circuit that an employer who acted in good faith in firing an employee may be liable where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions . . . .") (internal quotation omitted).

However, even if the Court were to apply *Elrod*, the Court would nevertheless deny Amtrak's motion for summary judgment on this claim because of significant factual differences between *Elrod* and this case. First, the plaintiff in *Elrod* complained only that the discharge was discriminatory; in the instant case, Morgan alleges that not only was the ultimate suspension discriminatory, but that the initiation of the charges was itself discriminatory. Second, the *Elrod* court held that Sears was entitled to judgment because it had a *good faith* belief that Elrod had engaged in misconduct. In light of the evidence presented suggesting that Amtrak's initiation

and prosecution of rule violations was discriminatory and retaliatory, there is a question of triable fact as to whether Amtrak had a good faith belief that the charges were founded. Similarly, Morgan has submitted evidence that the hearing itself was not fair. *See* Ramirez Decl. ¶¶ 3, 10. Third, the *Elrod* court made it clear that Sears was entitled to a directed verdict not only because Sears had acted on its good faith belief, but *also* because Elrod had not put forth substantially probative evidence that age was the motivating factor for his discharge. *See Elrod*, 939 F.2d at 1471. In the instant case Morgan has submitted a significant amount of evidence suggesting that Amtrak managers and supervisors may have acted with discriminatory intent in initiating and prosecuting charges of rule violations against Morgan. For these reasons, the Court hereby DENIES defendant's motion for summary judgment on this claim.

B. February 1995 Termination.

As with the September 1994 suspension, Amtrak argues that it has legitimate, nondiscriminatory reasons for terminating Morgan because Amtrak believed, based upon the Hearing Officer's decision, that Morgan was guilty of the charged violations. For the reasons set forth above, the Court rejects this argument. The Court finds that Morgan has raised a genuine issue of fact as to whether Amtrak's proffered reason for terminating him was simply pretext for race discrimination and retaliation. Much of the same evidence that Morgan submitted in relation to the September 1994 suspension is relevant to the February 1995 termination because it raises a genuine issue of fact as to whether the initiation of disciplinary charges against Morgan was discriminatory. Morgan has also submitted evidence that the investigatory hearing was unfair; Ramirez states in his declaration that Borge "directed and controlled" the hearing and that the Hearing Officer reversed his position after Borge expressed his opinion regarding the issue. *See* Ramirez Decl.,

¶ 3. Morgan has submitted the declaration of Meriola Gotthardt, a former Amtrak engineer, who states that in 1992 she overheard Chuck Berg, a road foreman, tell J.W. Deely (the Amtrak official who decided to terminate Morgan) that he was going to give some work to one of those "nigger bitches," and that Deely did not reprimand Berg. *See* Gottbardt Decl. ¶ 1[11] Gotthardt also states that in 1993 she heard Deely state that "the problem with these niggers is that after you train them, they walk out on you." *Id.* at ¶ 2. Gotthardt states she complained to Deely regarding the use of racial slurs at the Yard, and that nothing was done in response to her complaint. *Id.* at ¶ 5. Finally, Gotthardt states that in approximately late 1994 or early 1995, she saw Bordenave and Morgan having a "heated discussion," and that she heard Bordenave say he was going to accuse Morgan of threatening him and that "they" would believe him. *Id.* at ¶ 6.

For the reasons described above, the Court hereby DENIES defendant's motion for summary judgment on this claim.

C. Jury Duty

Morgan alleges that Amtrak did not pay him for jury duty served in June 1994 and January and February 1995. Amtrak argues Morgan has not established a *prima facie* case with regard to these allegations because the denial of jury pay is not an "adverse employment action" under Title VII and because Morgan has not submitted any evidence giving rise to an inference of discrimination. Morgan responds that the

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[11] Amtrak objects to Gotthardt's declaration on the ground that Morgan did not identify Gotthardt in his response to an interrogatory asking for all facts regarding Morgan's contention that Deely harbored racial animus. Amtrak requests that the Court strike Gotthardt's declaration, citing *School Dist. No. 1J. Multnomah Cty. v. Acands Inc., et al.* 5 F.3d 1255 (9th Cir. 1993). The Court declines to strike Gotthardt's declaration, concluding that it contains relevant evidence and that Morgan's failure to identify Gotthardt in his interrogatories was not in bad faith.

denial of jury duty pay is an adverse employment action, but does not address Amtrak's contention that there is no evidence in the record suggesting that the denial of jury pay was discriminatory or retaliatory.

Upon the Court's review of the record, the Court finds that Morgan has not put forth any evidence suggesting that the alleged denials of jury duty pay in 1994 and 1995 were discriminatory or retaliatory. Accordingly the Court finds that Morgan has not stated a *prima facie* case, and hereby GRANTS Amtrak's motion for summary judgment on these claims.

D. Canceled Training

Morgan alleges that Amtrak canceled training that was scheduled for him in October 1994. Amtrak advances two arguments in its motion for summary judgment on this claim: (1) no one was provided training in October 1994, and therefore Morgan was not treated differently on the basis of his race; and (2) Morgan was certified to work on all Amtrak equipment, and therefore any denial of training did not constitute an "adverse employment action."

The Court rejects Amtrak's arguments and finds that there are disputed issues of material fact regarding Morgan's claim of canceled training. Morgan has submitted evidence that Borge told Biemborn not to train Morgan in October 1994 because Morgan had a "bad attitude." Morgan has also submitted evidence that Borge was known to make racially discriminatory remarks, and that Borge was part of a group of managers who desired to have Morgan terminated. Amtrak's assertion that no other Amtrak employee was provided training in October 1994 has no bearing on whether Amtrak discriminated and/or retaliated against Morgan by canceling his training.

The Court also rejects Amtrak's argument that Morgan's claim fails because the denial of training did not constitute an

"adverse employment action," concluding that there are genuine issues of disputed fact whether the denial of training adversely affected Morgan's employment. For these reasons, the Court DENIES defendant's motion for summary judgment on this claim.

E. Denial of Access to Work File

Morgan claims that in December 1994, Vandenburg denied his requests to view his work file, and that these denials were discriminatory and retaliatory. Amtrak argues that the denial of access to a work file is not an adverse employment action, and therefore that Morgan has not established a *prima facie* case regarding this claim. The Court agrees, finding that Morgan has not alleged any particular adverse consequences that flowed from the denial of access to his files. Based upon the facts of this case, it appears that this allegation is better viewed not as a separate claim, but merely as evidence that Morgan may submit of Amtrak's alleged discrimination and retaliation against him. Accordingly, the Court GRANTS Amtrak's motion for summary judgment on this claim.

F. Denial of Union Representation

As noted earlier, although Morgan has stated in discovery responses that he believes Amtrak discriminated and/or retaliated against him by denying him union representation at a meeting in December 1994, Morgan does not discuss this allegation in his opposition papers, nor does he present any evidence in support of this allegation. Accordingly, the Court GRANTS Amtrak's motion for summary judgment on this claim, as Morgan has failed to establish a *prima facie* case regarding this allegation.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendant's motion for summary judgment on Morgan's claims regarding: (1) alleged discrimination or retaliation

which occurred prior to the 300-day limitations period, or May 3, 1994; (2) posting the notice of the grievance in early 1995; (3) denial of Morgan's bid for job number 515 in 1995; (4) denial of jury duty pay in 1994 and 1995; (5) denial of access to work files in December 1994; and (6) denial of union representation in December 1994.

Finding there are triable issues of fact, the Court hereby DENIES defendant's motion for summary judgment on Morgan's claims regarding: (1) the September 1994 suspension; (2) the February 1995 suspension and termination; and (3) cancellation of training in October 1994.

IT IS SO ORDERED

Dated: September 10, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

Supreme Court, U.S.
FILED
MAY 23 2001
OFFICE OF THE CLERK

No. 00-1614

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION

Petitioner,

v.

ABNER J. MORGAN, JR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Reasons for Denying the Writ 4

I. THE DOCTRINE OF CONTINUING VIOLATION WAS CORRECTLY APPLIED TO THIS CASE 4

II. NINTH CIRCUIT JURISPRUDENCE DOES NOT CONFLICT WITH SUPREME COURT DECISIONS 7

III. THERE IS NO MEANINGFUL CIRCUIT SPLIT 9

IV. THE PURPOSE OF THE NOTICE LIMITATION WOULD NOT BE SERVED IN THIS CASE 14

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Alexander v. Local 496, 177 F.3d 394 (6th Cir. 1999) 12

Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999) 5, 9

Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999) 13

Annis v. County of Westchester, 136 F.3d 239 (2nd Cir. 1998) 12

Audi Vision, Inc. v. RCA Mfg. Co. 136 F.2d 621, 147 ALR 574 (2nd Cir. 1943) 7

Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983) 9, 10, 11, 14

Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991), *cert denied* 112 S.Ct. 617, 116 L.Ed.2d 639 7

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999) 10

Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559 (8th Cir. 1992) 13

Cornwell v. Robinson, 23 F.3d 694 (2nd Cir. 1994) 12

Cruz v. Coach Stores, Inc., 202 F.3d 560 (2nd Cir. 2000.) 12

Curry v. District of Columbia, 195 F.3d 654, n. 14 (D.C. Cir. 1999) 13

Delaware State College v. Ricks, 449 U.S. 250 (1980) 8

Dixon v. Anderson, 928 F.2d 212 (6th Cir. 1991) 12, 13

Draper v. ECR Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) 4, 6, 7, 9, 14

Fielder v. UAL Corporation, 218 F.3d 973 (9th Cir. 2000) 5, 6

Galloway v. General Motors Svc. Parts Operations, 78 F.3d 1164 (7th Cir. 1996) 6

Gipson v. KAS Snacktime Co., 83 F.3d 225 (8th Cir. 1996) 6, 15

Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989) 5, 7, 9

Gutowsky v. County of Placer, 108 F.3d 256 (9th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997) 5

Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992) 12

International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976). 8

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) 13

Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000) 12

Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687 (2nd Cir. 1990) 7

Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 S.Ct. 1348 (1986) 1

Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) 6

Milton v. Weinberger, 645 F.2d 1070 (D.C. Cir. 1982) 4

Morgan v. National Railroad Passenger Corp., 232 F.2d 1008 (9th Cir. 2000.) ..... *passim*

O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) 9, 14

Palmer v. Kelly, 17 F.3d 1490 (D.C. Cir. 1994) 13

Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998) 9

Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993) 10

Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) 12

Reed v. Lockheed Aircraft Corporation, 613 F.2d 757 (9th Cir. 1980) 5

Ricks, Chardon v. Fernandez, 454 U.S. 6 (1981) 8

Sosa v. Hiraoka, 920 F.2d 1451 (9th Cir. 1990) 5

Tirona v. State Farm Mut. Auto. Ins., 812 F.Supp. 1083 (D.Hi. 1993) 7

United Airlines v. Evans, 431 U.S. 553 (1977) 8

Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2nd Cir. 1996) 12

Varner v. National Super Mkts., Inc., 94 F.3d 1209 (8th Cir. 1996) 13

West v. Philadelphia Elec. Co., 45 F.3d 744 (3rd Cir. 1995) 10, 11

Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1982) 7

Woods v. Mertes 9 F.R.D. 318 (D.C.Del. 1949) 7

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 4

Statutes:

42 U.S.C. § 1981 8

42 U.S.C. § 2000e ..... *passim*

STATEMENT OF THE CASE

This case arises out of a horrendous pattern of blatant racial harassment, race discrimination and retaliation at AMTRAK's Yard in Oakland, California. For five years, ABNER MORGAN, an African-American electrician, endured a torrent of racially motivated actions, including retaliatory disciplinary actions, denial of career and training opportunities, punitive job assignments, physical assault by the Yard's highest official, and termination based upon a fabricated accusation of threatening a supervisor.[1]

Even after the trial court improperly limited AMTRAK's liability, the evidence at trial portrayed a Yard environment permeated with racially derogatory comments and acts, racially motivated personnel practices, and blatant retaliation against anyone perceived to be aligned with MR. MORGAN, all perpetrated and condoned by the same small cabal of managers.[2]

Following two and a half days of deliberation, the jury exonerated AMTRAK only with the gravest misgivings, and

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[1]The gravamen of the appeal was the district court's error in ruling favorably on Amtrak's Motion for Summary Judgment; accordingly, the posture of the case requires that the facts be construed in the light most favorable to Mr. Morgan. (*Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).)

[2](*See Morgan v. National Railroad Passenger Corp.*, 232 F.2d 1008, 1013 (9th Cir. 2000.)

was clearly hamstrung by the trial court's improper rulings on the law.[3]

AMTRAK seeks to invoke review by this Court by asserting that "the Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period." (*See* Amtrak's Petition @ 11.) This assertion is a misstatement of fact and law. Throughout its decision, the Court specifically eschewed such an approach - "precedent makes clear that the alleged incidents of discrimination cannot be isolated, sporadic or discrete;"[4] "Morgan must raise a genuine issue of disputed fact as to 1) the existence of a continuing violation - be it serial or systemic; and 2) that the violation continued into the limitations period;"[5] "such incidents are not discrete or isolated;"[6] and "the incidents demonstrate a regular pattern of potentially retaliatory conduct throughout Morgan's tenure."[7]

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[3]The jury delivered a note signed by all of the jurors along with the verdict, commenting on the verdict and the evidence, and condemning Amtrak's management for engaging in "grossly unprofessional and questionable ethical conduct."

[4](*Morgan*, 232 F.2d *supra* at 1015.)

[5](*Morgan*, 232 F.2d *supra* at 1016.)

[6](*Ibid.*)

[7](*Morgan*, 232 F.2d *supra* at 1017.)

AMTRAK's contention that the *Morgan* decision is inconsistent with decisions by this Court is equally flawed. A close reading of the relevant Ninth Circuit decisions plainly reveals that the Ninth Circuit has always abided by the Supreme Court's admonition that the continuing violation theory applies only where the plaintiff can show at least one related violation of Title VII within the statutory period. AMTRAK's portrayal of the Ninth Circuit as a "renegade" is patently misleading; Ninth Circuit jurisprudence is echoed in the Second, Third, Sixth, Eighth and District of Columbia Circuits.

The doctrine of continuing violation is an equitable one; there is no stronger case than this that cries out for equity and swift justice. AMTRAK's assertion that MR. MORGAN "sat on his rights" is incredibly arrogant. Mr. Morgan tried to work within AMTRAK's system and as the jury lamented in its note commenting on the verdict, "the EEO office of AMTRAK was woefully remiss in following up & supervising its recommendation for procedural changes at the Oakland facility, and their general sincerity questionable." To penalize MR. MORGAN for trusting AMTRAK under these circumstances would truly mock Title VII's mandate for racial equality in the workplace.

REASONS FOR DENYING THE WRIT

I. THE DOCTRINE OF CONTINUING VIOLATION WAS CORRECTLY APPLIED TO THIS CASE

The three hundred (300) day statutory period under Title VII operates as a statute of limitations, (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982)), and a claim under the Act will not be sustained if it is based on an event or events that occurred more than 300 days before the filing of a charge. Like a statute of limitations, however, the limitations period contained in Title VII is "subject to waiver, estoppel, and equitable tolling." (*Zipes*, 455 U.S. *supra* at 393; *Draper v. ECR Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998).)

It is well settled that the purpose of the continuing violation doctrine is to allow aggrieved persons "the maximum benefit of the law." (*Zipes*, 455 U.S. *supra* at 395.) In *Zipes*, *supra* at 398, the Court pointed out that:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to a waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

(*Accord*, *Milton v. Weinberger*, 645 F.2d 1070, 1075, n. 14 (D.C. Cir. 1982) ("continuing violation principle is a judicial creation designed to carry out the congressional intent of affording the most complete relief possible in

Title VII cases.")))

The continuing violation doctrine has long allowed Courts to toll the statute of limitations in certain circumstances. A plaintiff who alleges a policy or practice of systemic discrimination, as opposed to alleging only individual discriminatory acts, may utilize the continuing violation doctrine. (*Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997); *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999); *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990).)

It is well established that "[u]nder the continuing violation doctrine, ***'a systematic policy of discrimination*** is actionable, even if some or all of the events evidencing its inception occurred prior to the limitations period.'" (*Sosa v. Hiraoka*, 920 F.2d *supra* at 1455 (emphasis added); *see also, Reed v. Lockheed Aircraft Corporation*, 613 F.2d 757, 760-761 (9th Cir. 1980) (continuing violations are actionable).) If the plaintiff shows "the maintenance of a discriminatory system both before and during the limitations period," the action is timely. (*Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989).)

These cases make clear that long before the Ninth Circuit's decision in *Fielder v. UAL Corporation*, 218 F.3d 973 (9th Cir. 2000) and *Morgan*, the continuing violation doctrine was applied to discrimination, harassment, and retaliation claims.[8] Indeed, a special relationship exists between the

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[8]As *Fielder* was also a retaliation case and the Court applied the continuing violation theory to the retaliation claims, AMTRAK's

continuing violation doctrine and a hostile environment claim, as noted in *Draper,* 147 F.3d *supra* at 1108:

> A "hostile work environment" occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986). Accordingly, claims that raise a genuine issue of material fact as to the existence of a hostile environment involve allegations of continuing violations. *See Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996) (noting that a situation amounting to a hostile work environment is "an ongoing nightmare for the employee victim"); *Galloway v. General Motors Svc. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996) ("Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event.").

As noted earlier, AMTRAK ignores the fundamental Ninth Circuit requirement for invoking the continuing violation doctrine: that there be *a continuing pattern* of discrimination.[9] The Ninth Circuit has not hesitated to find that when

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contention that *Fielder* is narrower in scope than *Morgan* is also misleading.

[9]Ironically, AMTRAK's Motion for Summary Judgment did not even address Mr. Morgan's hostile environment claim, and thus, Amtrak was not entitled to any type of summary adjudication of that claim. Where a Motion for Summary Judgment or Summary

an employer stops discriminatory conduct and the employee subsequently takes no action during the statutory period, the employee cannot thereafter sue. (*Green*, 883 F.2d *supra* at 1472; *Draper*, 147 F.3d *supra* at 1111; *Williams v. Owens-Illinois*, 665 F.2d 918, 924 (9th Cir. 1982).) In this case, the district court as well as a unanimous *Morgan* panel found that alleged violations of MR. MORGAN's Title VII rights occurred within the statutory period. (*Morgan* @ 1016-1017.)

II. NINTH CIRCUIT JURISPRUDENCE DOES NOT CONFLICT WITH SUPREME COURT DECISIONS

The Supreme Court cases cited by AMTRAK validate the continuing violation doctrine and define its parameters in ways which do not affect MR. MORGAN's case. (*See e.g.*,

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Adjudication does not address claims, it does not bar any issue as to which summary adjudication was not either sought or denied. (*Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991), *cert denied* 112 S.Ct. 617, 116 L.Ed.2d 639; *Tirona v. State Farm Mut. Auto. Ins.*, 812 F.Supp. 1083 (D.Hi. 1993); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2nd Cir. 1990), on remand 752 F.Supp.102.) The Court retains full power to make a complete adjudication on the remaining claims at the appropriate time. (*Audi Vision, Inc. v. RCA Mfg. Co.* 136 F.2d 621, 147 ALR 574 (2nd Cir. 1943); *Woods v. Mertes* 9 F.R.D. 318 (D.C.Del. 1949).) In an *Order Re Hostile Work Environment Claim* filed on October 22, 1998, the district court acknowledged that Mr. Morgan's hostile environment claim survived AMTRAK's Motion for Summary Judgment but **still refused** to apply the continuing violation doctrine to even the hostile environment claim.

United Airlines v. Evans, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980).)

In *Evans*, the plaintiff alleged that she was discriminated against based on her employer's seniority system. She had been rehired after leaving the company based on its alleged discrimination, and she argued that her seniority upon rehire should have included her time away for work due to her employer's discrimination. (*Evans*, 431 U.S. 553-554.)

The Court held that to make use of the continuing violation theory in the context of a Title VII case the plaintiff must show a Title VII violation has occurred within the statutory period; not simply that the effects of a pre-statutory violation continue into the statutory period. (*Evans*, 431 U.S. 558-559.) The Court found that the seniority system was neutrally applied to men and women, and that it was plaintiff's original pre-statutory separation from work that triggered her duty to file an EEOC charge, not the neutral application of the seniority system on her return. (*Id.*)

Ricks simply applied *Evans* to a case in which the plaintiff argued that he was denied tenure because of his national origin in violation of Title VII and 42 U.S.C. § 1981. (*Ricks*, 449 U.S. *supra* at 252.) The Court determined that Mr. Ricks should have filed within 300 days of the denial of tenure because the subsequent one year teaching contract coupled with termination was a normal effect of the denial of tenure. (*Ricks*, 449 U.S. *supra* at 257-258.) There were no allegations of continuing violations or of illegal acts subsequent to the terminations in *Ricks*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981), or *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 232 (1976).

In the Ninth Circuit, to make use of the continuing violation doctrine a plaintiff must demonstrate that at least one act of harassment or discrimination occurred within the statutory period; simple effects of pre-statutory discrimination or harassment are not enough. (See, e.g., *Anderson*, 190 F.3d *supra*; *Draper*, 147 F.3d *supra*.) Plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during that period." (*Green*, 883 F.2d *supra* at 1480.)

III. THERE IS NO MEANINGFUL CIRCUIT SPLIT

Only four (4) Circuits have clearly adopted and strictly applied the "notice limitation" articulated in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983).) It appears that only the First, Fifth, Seventh and Eleventh Circuits have superimposed a "notice" limitation onto the elements of the continuing violation doctrine.[10] Nonetheless, even *Berry*, 715 F.2d *supra* at 981, emphasizes that the decision about what constitutes a continuing violation "turns on the facts and the context of each particular case," and is not subject to a litmus test of three or so factors.

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[10]Although *Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) purports to adopt the notice limitation in the First Circuit, in *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001), the Court pointed out that in *Provencher*, there was no discriminatory act alleged within the charge filing period. Nonetheless, the First Circuit in *O'Rourke* does adopt the notice limitation.

In *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310-1311, n. 4 (10th Cir. 1999), the Tenth Circuit similarly emphasized that there is "no bright line test;" and "[the three enumerated] factors [referenced in *Berry*] are merely tools to assist court's analysis." The Tenth Circuit also agrees with the Ninth Circuit that the plaintiff must demonstrate one act within the relevant limitations period and that earlier acts are part of a continuing pattern of discrimination. (*Id.* at 1310-1311.) Amtrak's reliance on *Purrington v. University of Utah*, 996 F.2d 1025, 1029 (10th Cir. 1993) is misplaced because there the Court specifically found that the two incidents alleged by plaintiff were not "related closely enough to evidence a dogged pattern of discrimination and thereby constitute a continuing violation."

West v. Philadelphia Elec. Co., 45 F.3d 744, 754-755 (3rd Cir. 1995) is entirely consistent with the Ninth Circuit's approach. In *West*, the plaintiff alleged that he had been subjected to a racially hostile environment. This environment included Mr. West's receipt of a Klu Klux Klan Christmas card, hostile conversations occurring with a white foreman, and management conclusions that race relation problems existed at work. (*West*, 45 F.3d *supra* at 749-751.) Much of this evidence was excluded during trial based on the fact that it fell outside of the statutory period.

On appeal, Mr. West argued that the trial court erred in excluding the pre-statutory evidence. The Third Circuit ruled in Mr. West's favor. In the process the Court heavily emphasized the "natural affinity" between the hostile work environment and continuing violation claims:

> In the arena of sexual [or racial] harassment, particularly that which is based on the existence of a hostile environment, it is reasonable to expect that violations are continuing in nature: a hostile environment results from acts of sexual [or racial] harassment which are pervasive and continue over time. . . . Accordingly, claims based on hostile environment sexual [or racial] harassment often straddles both sides of an artificial statutory cutoff.

(*West*, 45 F.3d *supra* at 755 (citing a Fifth Circuit case).)

The Court next held:

> Although we decline to adopt a *per se* rule that a properly alleged hostile work environment claim also constitutes a continuing violation, we agree that West has alleged facts sufficient to support application of the continuing violations theory in this case. First, all of the incidents alleged by the plaintiff involved racial harassment . . . Second, the incidents are alleged to have occurred consistently over the period since 1986, with increased frequency in 1989-1990. (*Id.*)

The Court's discussion of *Berry* and the "notice inquiry" is relegated to footnote nine, wherein the Court remarks "[w]e also find this approach, providing a non-exhaustive list of factors, to be helpful," and then simply sets forth the *Berry* requirements without further reference.

In the Second Circuit, the continuing violation exception "extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimina-

tion even if those acts, standing alone, would have been barred by the statute of limitations." (*Annis v. County of Westchester*, 136 F.3d 239, 246 (2nd Cir. 1998); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2nd Cir. 1996).) No notice limitation is imposed. (*Id.*)

A continuing violation may be found "where there is proof of specific ongoing discriminatory polices or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." (*Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998); *see also Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569, n. 4 (2nd Cir. 2000.)

The Sixth Circuit has long recognized that an ongoing, continuous series of discriminatory acts may be challenged if one of those discriminatory acts occurred within the limitations period. (*Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir. 1992); *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991); *Alexander v. Local 496*, 177 F.3d 394 (6th Cir. 1999).) The Circuit does not impose a notice limitation upon plaintiffs. Instead, when or if a continuing violation is shown, "a plaintiff is entitled to have a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." (*Alexander*, 177 F.3d *supra* at 408; *Accord, Kovacevich v. Kent State University*, 224 F.3d 806, 829-830 (6th Cir. 2000).)

The Sixth Circuit views continuing violations as falling into two categories. *(Haithcock*, 928 F.2d at 677.) The first

category of continuing violations arises "where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation; that is where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups." (*Dixon*, 928 F.2d at 216.) At least one of the forbidden discriminatory acts must have occurred within the relevant limitations period. (*Ibid.*) The second category of continuing violations arises "where there has occurred a longstanding and demonstrable policy of discrimination . . . there must be a continuing over-arching policy of discrimination." (*Id.* at 217.)

The Eighth Circuit recognizes that evidence of incidents occurring outside the limitations period may be admissible in a case where a continuing violation has been alleged. *(Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 563 (8th Cir. 1992); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997).) The Circuit also recognizes that a hostile environment can constitute such a continuous violation. (*Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996).)

Despite opportunity to do so, the District of Columbia Circuit has not demonstrated any inclination to adopt a "notice limitation." (*See Curry v. District of Columbia*, 195 F.3d 654, 661, n. 14 (D.C. Cir. 1999); *Anderson v. Zubieta*, 180 F.3d 329, 334-335 (D.C. Cir. 1999); *Palmer v. Kelly*, 17 F.3d 1490, 1496 (D.C. Cir. 1994).)

Although AMTRAK alleges that a serious "circuit split" merits the high court's attention, in the context of the facts of this case, the purported split is illusory.

IV. THE PURPOSE OF THE NOTICE LIMITATION WOULD NOT BE SERVED IN THIS CASE

The cases relied upon by AMTRAK often use the notice limitation to determine whether a group of acts forms a pattern sufficient to invoke the continuing violation doctrine or whether those acts represent discrete self-contained activities which are actionable by themselves, overemphasizing the importance of temporal activity. (*See Berry*, 715 F.2d *supra* at 981.) The notice limitation arguably places a plaintiff in an untenable position, having to demonstrate that: (1) there were enough pre and post statutory acts to create a continuing pattern of discrimination; and (2) there was not enough of a pattern to put the plaintiff on notice that her rights were being violated. (*See O'Rourke v. City of Providence*, 235 F.3d *supra* at 732 (potential anomaly noted by the court; issue often better resolved by juries.)

In this case, the purpose of the notice limitation would not be served and justice would be clearly thwarted. AMTRAK was on early notice that its harassment of Mr. Morgan was unfair and likely to be challenged, and it ignored his complaints and failed to take appropriate steps to ensure its own compliance with the law. In this case, AMTRAK is hardly in a position to complain of "unfair surprise" or prejudice of any kind. When the plaintiff has made an effort to assert his rights short of litigation, he or she should not be punished when the employer responds by dragging its feet, failing to properly investigate the complaints, or not attempting to correct the discriminatory conduct.

In this case, Mr. Morgan presented substantial evidence of an environment heavily polluted with racial bias and retaliatory intent, continuing into the limitations period. While AMTRAK chides the Ninth Circuit for citing to certain unspecified evidence at trial, Mr. Morgan's opposition to Amtrak's motion for summary motion presented substantial evidence of racially motivated conduct to the district court. (*See Appendix B* at pp. 45a, 46a and 49a.)

The degree of "permanence" to be attributed to AMTRAK's actions is extremely questionable given that many of the unfair actions taken against Mr. Morgan were remedied through union grievances, and did not even rise to the level of formal adverse actions. The counsellings, the punitive and demeaning job assignments, the denial of training, union representation, and other job benefits without any explanation or justification, taken as discrete acts would hardly qualify for compensatory damages or warrant a federal lawsuit. Taken together as a series of cumulative acts, they become powerful evidence of "an ongoing nightmare" for Mr. Morgan. (*See Draper*, 147 F.3d *supra* at 1108, citing *Gipson v. KAS Snacktime Co.*, 83 F.3d *supra* at 229.

Furthermore, it is clear that the conduct complained of by Mr. Morgan was significant in its cumulative effect - AMTRAK was "building a case" against him and obviously, setting him up to be terminated. As noted earlier, the district court's failure to apply the continuing violation doctrine coupled with its failure to distinguish the hostile environment claim from the discrimination and retaliation claims effectively denied Mr. Morgan a fair trial on the hostile environment claim. (*See* Note 9, *supra*.) Under the circumstances of this case, justice and equity compel reversal of the judgment.

CONCLUSION

For all of the above reasons, AMTRAK's Petition should be denied in its entirety. The continuing violation doctrine clearly and appropriately should have been applied to this shockingly blatant case of racial harassment, race discrimination and retaliation. This case is simply not the one to provide guidance to those minority circuits who have attempted to limit the continuing violation doctrine.

Dated: May 23, 2001

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IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY TO RESPONDENT'S BRIEF IN OPPOSITION	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	4
Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993)	2
Berry v. Bd. Of Supervisors, 715 F.2d 971 (5th Cir. 1983)	2, 5
Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)	6
Delaware State Coll. v. Ricks, 449 U.S. 250 (1980)	3, 4
Fielder v. UAL, 218 F.3d 973 (9th Cir. 2001)	5
Garrison v. Burke, 165 F.3d 565 (7th Cir. 1999)	2
Hipp v. Liberty Nat'l. Life Ins. Co. (No. 99-10699), 2001 WL 575489, *8 (11th Cir. May 29, 2001)	2
Huckabay v. Moore, 142 F.3d 233, 239 (5th Cir. 1998)	3
Int'l. Union of Elec. Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-35 (1976)	4
Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975)	4
Love v. Pullman Co., 404 U.S. 522 (1972)	2
O'Rourke v. City of Providence, 253 F.3d 713 (1st Cir. 2001)	3
Purrington v. Univ. of Utah, 996 F.2d 1025 (10th Cir. 1993)	2
Roberts Gadsden Mem'l Hosp., 850 F2d 1549 (11th Cir. 1988)	2
Sabree v. United Brotherhood of Carpenters & Joiners Local 33, 921 F.2d 396 (1st Cir.1990)	2
Soigner v. Am. Bd. Of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996)	4

TABLE OF AUTHORITIES—Continued

	Page
United Airlines v. Evans, 431 U.S. 553 (1977)	3
Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996)	2
Webb v. Cardiothoracic Surgery Ass'n, 139 F.3d 532 (5th Cir. 1998)	2
West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995)	3
STATUTES	
42 U.S.C. § 1981	4
42 U.S.C. § 2000e-5(e)(1)	1, 6

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

National Railroad Passenger Corporation's petition for certiorari demonstrated that the decision of the United States Court of Appeals for the Ninth Circuit, permitting a plaintiff who knowingly allowed the statute of limitations to lapse to rely on the continuing violation doctrine to proceed with his claims, is inconsistent with both decisions of this Court and every other circuit court of appeals that has decided the issue. Respondent argues in opposition that: (1) the continuing violation doctrine was correctly applied in this case; (2) the Ninth Circuit's decision is not in direct conflict with Supreme Court precedent; (3) the split between the circuits is "illusory" because it involves a "minority" of circuits; and (4) the purpose of the "notice" limitation would not be served in this case. Respondent advocates an extremely expansive interpretation of the continuing violation doctrine, which has been rejected by this Court and all other circuits, that would permit reliance on the continuing violation doctrine whenever a plaintiff alleged *any* discriminatory conduct within the limitations period. Such an interpretation eviscerates Section 706(e)'s limitations period. There is a real conflict between the Ninth Circuit and the decisions of this Court and other federal courts of appeals. That conflict warrants this Court's review.

1. Respondent argues that the continuing violation doctrine was correctly applied in this case because *some* allegedly discriminatory conduct occurred within the statutory limitations period. Respondent contends that reliance on the continuing violation doctrine is warranted regardless of when plaintiff knew of the allegedly discriminatory conduct. (Br. in Opp. 4-7).[1] Significantly, Respondent does not dispute

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[1] In support of his argument, Respondent relies solely on other Ninth Circuit court of appeals' decisions. However, as Respondent acknowledges, these decisions are in direct conflict with decisions of other circuit courts of appeals which have held that the continuing

that he was aware of the allegedly discriminatory conduct nearly five years before he filed his EEO charge. (Br. in Opp. 14-15; Pet., App. 7a). Contrary to Respondent's assertion, the continuing violation doctrine was not designed to assist a plaintiff in preserving claims when he knew of the allegedly discriminatory nature of the conduct and failed to act. The continuing violation doctrine is premised on the equitable notion that the statute of limitations period should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993). It is not designed to allow plaintiffs who know of allegedly discriminatory conduct to wait indefinitely to pursue their rights. *Hipp v. Liberty Nat'l. Life Ins. Co.*, (No. 99-10699), 2001 WL 575489, *8 (11th Cir. May 29, 2001)("This circuit and others have . . . [held] that 'a claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period.'"), *quoting Roberts Gadsden Mem. Hosp.*, 850 F2d 1549, 1550 (11th Cir. 1988). An interpretation of the continuing violation doctrine that allows a plaintiff to revive stale claims when the plaintiff knowingly fails to pursue them undermines the express purposes of the limitations period which is "to ensure expedition in the filing and handling of [discrimination claims]." *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972).

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violation doctrine should not be applied in cases where the plaintiff was aware of the allegedly discriminatory nature of the acts at the time they were taking place. *See e.g., Garrison v. Burke*, 165 F.3d 565 (7th Cir. 1999); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Webb v. Cardiothoracic Surgery Ass'n*, 139 F.3d 532, 538 (5th Cir. 1998); *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993); *Sabree v. United Brotherhood of Carpenters & Joiners Local 33*, 921 F.2d 396 (1st Cir. 1990); *Berry v. Bd. Of Supervisors*, 715 F2d 971 (5th Cir. 1983).

Respondent also argues that reliance on the continuing violation doctrine was appropriate in this case because he alleged a hostile work environment claim. (Br. in Opp. at 5-6). However, as the First Circuit noted in *O'Rourke v. City of Providence*, the Ninth Circuit's absolute rejection of any notice limitation on the continuing violation doctrine "conflate[s] the question of whether there is an actionable hostile environment with the question of an exception to the 300 day filing requirement." *O'Rourke*, 235 F.3d at 731 n. 6. The First Circuit, among others, rejected "such a *per se* approach." *Id.; West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995); *Cf., Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998)(declining to decide whether every hostile environment claim necessarily constitutes a continuing violation).

2. Respondent then argues that Ninth Circuit jurisprudence is not in conflict with decisions of this Court. (Br. in Opp. 7-9). The crux of Respondent's argument is that in this Court's decisions in *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), there were no allegations of continuing violations or of illegal acts subsequent to the terminations—thus, there was no violation within the limitations period which could serve as an anchor for earlier untimely claims. (Br. in Opp. at 8-9). By contrast, Respondent argues, he did allege some discriminatory conduct that occurred within the limitations period. (Br. in Opp. at 9). Respondent's attempt to distinguish this Court's decisions fails because, at least in the case of *Ricks*, the plaintiff had alleged discriminatory conduct which occurred within the limitations period. In *Ricks*, the plaintiff argued that the continuing violation doctrine should apply to save his discriminatory denial of tenure claim in part because of a number of "unusual incidents"—including an alleged assault—that occurred within the limitations period. *Ricks*, 449 U.S. at 257, n. 8. Nevertheless, this Court rejected

plaintiff's reliance on the continuing violation doctrine and held that his claim was time-barred. *Id.*

Moreover, Respondent's attempt to distinguish this case factually from cases previously considered by this Court misses the point. This Court has adhered to the rule that a discrete event—such as a termination—triggers the running of the limitations period. *Ricks*, 449 U.S. at 257-58; *Int'l. Union of Elec. Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234-35 (1976). In this case, the first event that Respondent alleges was discriminatory—and that he acknowledges he believed was discriminatory at the time it happened—was his termination in 1991. (Pet., App. 7a). Respondent argues that because this termination was later reduced to a suspension, it lacks the requisite degree of "permanence" and thus, is not a discrete event. (Br. in Opp. 15). Respondent's argument directly conflicts with *Robbins & Myers*, where this Court held that the limitations period for filing a Title VII claim was not tolled during the pendency of grievance procedures under a collective bargaining agreement. *Robbins & Myers*, 429 U.S. at 236 ("the contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee.'") *citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Accordingly, an employee is entitled to pursue both remedies available under the collective bargaining agreement and those available under Title VII. The employee, however, must pursue both avenues simultaneously to preserve his claims. *See Johnson v. Railway Express Agency,* 421 U.S. 454 (1975)(holding that filing an EEO charge did not toll the running of the statute of limitations applicable to action under 42 U.S.C. § 1981); *Soignier v. Am. Bd. Of Plastic Surgery*, 92 F.3d 547, 553 (7th Cir. 1996)("An employee's pursuit of an internal grievance procedure does not affect the date on which his claim accrued.")

3. Respondent next argues that there is no meaningful circuit split because, by his count, only four other circuits are in direct conflict with the Ninth Circuit. (Br. in Opp. 9-13). Respondent does not count the Fifth Circuit as being in direct conflict with the Ninth Circuit, ignoring the fact that it expressly rejected the Fifth Circuit's analysis of the continuing violation doctrine. (App. 15a); *see also Fielder v. UAL*, 218 F.3d 973, 987 n. 10 (9th Cir. 2000). Continuing to rely on the incorrect premise that the Fifth Circuit's decision in *Berry v. Bd. Of Supervisors*, 715 F.2d 971 (5th Cir. 1983) is not at odds with the Ninth Circuit's decision in this case, Respondent parses the language of other circuit courts of appeals' cases which rely on *Berry* and concludes that the circuit split is "illusory" as only a "minority" of circuits are involved. (Br. in Opp. 13; 16). Respondent's quibble over the number of circuits that are in open and direct disagreement with the Ninth Circuit is disingenuous as the circuit split is real; the issue presented is important; and it impacts substantive rights of both plaintiffs and defendants.

4. Respondent further argues that the purpose of "notice" limitations is not served in this case because Petitioner was on notice of the allegedly discriminatory conduct. (Br. in Opp. 13-15). Again, Respondent misses the point, as the question of when a defendant knew that its conduct was perceived to be discriminatory is irrelevant to the application of the continuing violation doctrine. Moreover, whether or not the complained of conduct would "qualify for compensatory damages or warrant a federal lawsuit . . ." is also irrelevant. (Br. in Opp. 15). The only relevant inquiry is when the plaintiff knew that the conduct was discriminatory in nature. Indeed, the "permanence" factor in *Berry* is designed to ascertain whether the complained of conduct "should trigger an employee's awareness of and duty to assert his or her rights . . ." *Berry*, 715 F.2d at 981. Respondent admits that he believed the complained of conduct was discriminatory, (Pet., App. 7a), but he failed to file a timely EEO charge.

Respondent finally argues that when a plaintiff makes an effort to assert his rights short of litigation, he should not be penalized for the employer's failure to respond to such efforts and should be permitted to rely on the continuing violation doctrine to revive time-barred claims. (Br. in Opp. 14). Once again, Respondent's argument is misplaced and without foundation. The "notice" limitation not only ensures that employers have notice of adverse claims, but it also ensures that employees do not sit on their rights and then attempt to pursue stale claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983)(noting that limitations periods are intended to put defendants on notice of adverse claims "*and to prevent plaintiffs from sleeping on their rights.*")(emphasis added). As discussed more fully in the Petition, this Court has expressly rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e). (Pet. 22-26). In this case, Respondent chose not to file a timely EEO charge and elected to seek resolution of his dispute through other means. Respondent was not prevented from filing a timely charge and Petitioner should not be penalized for Respondent's choice.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-1614

IN THE

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NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED JUNE 25, 2001

13 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Judgment	6
Special Verdict	7
Order Granting Petition for a Writ of Certiorari	11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

3:96-cv-3585

MORGAN,

Plaintiff,

v.

NATIONAL RAILROAD, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/2/96	1	COMPLAINT Summons (es) issued; Fee status pd entered on 10/2/96 in the amount of $120.00 (Receipt No. 802490); jury demand [3:96-cv-03585] (wk) [Entry date 10/04/96]
8/4/98	91	DECLARATION by Michael Williams on behalf of Plaintiff Abner J. Morgan Jr. re opposition [90-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98]
8/4/98	92	DECLARATION by Arthur Elwood Conley on behalf of Plaintiff Abner J. Morgan Jr. re opposition [90-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98]
8/4/98	93	UNDER SEAL DECLARATION by Pamela Y. Price on behalf of Plaintiff Abner J. Morgan Jr. re opposition [90-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98] [Edit date 08/19/98]

DATE	NO.	PROCEEDINGS
8/4/98	98	DECLARATION by Joe George on behalf of Plaintiff Abner J. Morgan Jr. re opposition [97-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98]
8/4/98	99	DECLARATION by Meriola Gotthardt on behalf of Plaintiff Abner J. Morgan Jr. re opposition [97-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98]
8/4/98	100	DECLARATION by Robert Ramirez on behalf of Plaintiff Abner J. Morgan Jr. re opposition [97-1] [3:96-cv-03585] (cgd) [Entry date 08/05/98]
8/6/98	106	AMENDED DECLARATION by Abner J. Morgan on behalf of Plaintiff re opposition [105-1] [3:96-cv-03585] (cgd) [Entry date 08/11/98]
9/11/98	119	ORDER by Judge Susan Illston : the Court GRANTS defendant's motion for summary judgment on Morgan's claims regarding: (1) alleged discrimination or retaliation which occurred prior to the 300-day limitations period or 5/3/94; (2) posting the notice of the grievance in early 1995; (3) denial of Morgan's bid for job number 515 in 1995; (4) denial of jury duty pay in 1994 and 1995; (5) denial of access to work files in 12/94; and (6) denial of union representation in 12/94. Finding there are triable issues of fact, the Court hereby DENIES defendant's motion for summary judgment on Morgan's claims regarding: (1) the September 1994 suspension; (2) the Feb. 1995 suspension

DATE	NO.	PROCEEDINGS
		and termination; and (3) cancellation of training in Oct. 1994. [66-1], [66-2], [54-1], [54-2]. (Date Entered: 9.15.98) (cc: all counsel) [3:96-cv-03585] (cgd) [Entry date 09/15/98]
10/13/98	160	OPPOSITION by Plaintiff Abner J. Morgan Jr. to Defendant's motion in limine to exclude any evidence concerning time-barred claims [135-1] [3:96-cv-03585] (cgd)
10/14/98	176	FINAL PRETRIAL SCHEDULING ORDER by Judge Susan Illston—(see order dated 10/14/98 for details). Motions in limine: the parties filed 14 motions in limine as follows: Plaintiff's motions ; granting motion in limine to exclude impermissible character evidence re: Amtrak employees [127-1], granting motion in limine to exclude evidence re: marijuana use, prior EEO complaints and military discharge [128-1], granting in part and denying in part motion in limine to exclude evidence re: quasi-judicial proceedings [129-1] DENY as to internal AMTRAK investigations pursuant to collective bargaining agreement, for reasons set out by defendant in its opposition and GRANTED as to EEOC "unable to conclude" letter based on FRE 403, granting motion in limine to exclude settlement discussions [126-1], denying motions in limine to exclude evidence re defense experts [143-1], [139-1], Defendants' Motions : granting motion in limine to exclude the testimony of

DATE	NO.	PROCEEDINGS
		Sophenia Maxwell, Robert Ramirez and Diane Sanchez [138-1], denying motion in limine to exclude evidence of stray remarks [136-1], denying motion in limine to exclude witnesses and evidence not disclosed by 10/5/98 [133-1], granting motion to bifurcate punitive damages [131-1], granting in part and denying in part motion in limine to exclude any evidence concerning time-barred claims [135-1], granting motion in limine to exclude in admissible lay opinion testimony and speculation by others as to Amtrak's "state of mind" [132-1], granting motion in limine to exclude evidence of prior consent decrees [137-1] (Date Entered: 10.15.98) (cc: all counsel) [3:96-cv-03585] (cgd) [Entry date 10/15/98]
10/26/98	199	TRIAL MINUTES: (C/R Rhonda Aquilina) (Hearing Date: 10/21/98) Jury trial began 8:30 10/21/98. Voir dire began 10/21/98. Further trial 10/22/98 at 8:30a.m. Trial witnesses, etc., jury selected. [3:96-cv-03585] (dcap) [Entry date 10/27/98]
11/19/98	239	SPECIAL VERDICT for Defendants National Railroad Passenger Corp. dba AMTRAK against Plaintiff Abner J. Morgan Jr. [3:96-cv-03585] (cgd) [Entry date 11/23/98]
11/19/98	240	JURY COMMENTS ON VERDICT. [3:96-cv-03585] (cgd) [Entry date 11/23/98]
11/20/98	247	TRIAL MINUTES: (C/R Rhonda Aquilina) (Hearing Date: 11/17/98) Trial held ;

DATE	NO.	PROCEEDINGS
		further trial 11/18/98 at 8:30a.m. Defendants' Rule 50(a) motion—Denied. Jurors were given final jury instructions. Counsel provided their closing statements. Jury out for deliberations. [3:96-cv-03585] (cgd) [Entry date 11/23/98]
11/24/98	253	JUDGMENT: Pursuant to the Special Verdict dated 11/19/98, judgment shall be entered in favor of defendant National Railroad Passenger Corp. dba Amtrak, and against plaintiff Abner J. Morgan, Jr. by Judge Susan Illston dismissing case ; appeal filing ddl 12/28/98. (Date Entered: 11.25.98) (cc: all counsel) [3:96-cv-03585] (cgd) [Entry date 11/25/98]
3/3/99	275	NOTICE OF APPEAL by Plaintiff Abner J. Morgan Jr. from Dist. Court decision verdict [239-1] Fee status Paid, $105.00 (rec. no. 135087) ; did not submit civil appeals docketing statement. [3:96-cv-03585] (cgd) [Entry date 03/05/99]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Nov 24, 1998]

No. C 96-03585 SI

ABNER J. MORGAN, JR.,
Plaintiff,

v.

NALT'L RAILROAD PASSENGER,
Defendant.

JUDGMENT

This action came on for trial before the jury, the Honorable Susan Illston, United States District Judge presiding. The issues having been tried before the Court and a special verdict rendered on November 19, 1998.

IT IS ORDERED AND ADJUDGED that pursuant to the special verdict, judgment shall be entered in favor of defendant National Railroad Passenger Corp., dba Amtrak, and against plaintiff Abner J. Morgan, Jr.,

IT IS SO ORDERED.

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

Dated: 11/23/98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Nov 19, 1998]

No. C-96-3585 SI

ABNER J. MORGAN, JR.,
Plaintiff,

v.

NALT'L RAILROAD PASSENGER, CORP.,
dba AMTRAK,
Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

I. Race Discrimination:

1. Did defendant AMTRAK discriminate against plaintiff Morgan because of his race, when plaintiff was suspended for fifteen days in September 1994?

Answer: Yes NO X

2. Did defendant AMTRAK discriminate against plaintiff Morgan because of his race, with respect to training in October, 1994?

Answer: Yes NO X

3. Did defendant AMTRAK discriminate against plaintiff because of his race, when plaintiff was terminated in February, 1995?

Answer: Yes NO X

II. Retaliation:

4. Did defendant AMTRAK retaliate against plaintiff Morgan because of his complaints about racial discrimination in the workplace, by subjecting him to an adverse employment action between May, 1994 and February, 1995?

Answer: Yes NO X

III. Harassment:

5. Was plaintiff Morgan subject to a hostile work environment because of racial harassment in the workplace between May, 1994 and February, 1995?

Answer: Yes NO X

If your answers to questions 1 through 5 were all "NO," please skip the rest of the questions, go to the end of the Special Verdict form, and sign and date it. If your answer to any of questions 1 through 5 was "YES," please answer the next question.

6. Did plaintiff Morgan suffer any harm or injury which was caused by the discrimination, retaliation and/or harassment you found to have been committed by AMTRAK?

Answer: Yes NO

7. What amount of damages, if any, is plaintiff Morgan awarded against defendant AMTRAK as a result of harm or injury which you found to have been caused by the discrimination, retaliation and/or harassment you found to have been committed by AMTRAK? You may award damages for as many categories as you appropriate.

a. Past lost income: $ _____

b: Present value of future lost income $ _____

c: Non-economic damages $ _____

Total (a + b + c): $ _____

8. With respect to any act you found to constitute race discrimination, retaliation or harassment of plaintiff Morgan, was defendant AMTRAK's conduct malicious or in reckless disregard of plaintiff's right?

Answer: Yes NO

Dated: 11/19/98

/s/ Martha Mayo
MARTHA MAYO
FOREPERSON

C-96-3585 SI

ABNER MORGAN

v.

NATIONAL RAILROAD PASSENGER CORPORATION.,

Nature of Case: Employment Civil Rights

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REFERRAL:

proof of service

SUPREME COURT OF THE UNITED STATES

No. 00-1614

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.

June 25, 2001
Case below, 232 F.3d 1008

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

Aug 29, 2001

(5)

Supreme Court, U.S.
FILED
AUG 29 2001
OFFICE OF THE CLERK

No. 00-1614

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

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64 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit:

1. National Railroad Passenger Corporation, a federally chartered corporation, dba Amtrak, defendant-appellee; and

2. Abner Morgan, Jr., plaintiff-appellant.

Petitioner National Railroad Passenger Corporation is federally chartered and is not a publicly traded corporation. The United States of America owns 100% of the preferred shares under the name of the Secretary of Transportation. The following companies each own10% or more of the corporation's common stock: Burlington Northern Santa Fe Corporation and American Premier Underwriters (successor to the Penn Central Railroad).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. IN A TITLE VII CASE, A CAUSE OF ACTION ACCRUES AND SECTION 706(e)'s LIMITATIONS PERIOD RUNS FROM THE DATE OF THE DISCRETE ALLEGEDLY DISCRIMINATORY ACT 10

A. Section 706(e) Was Drafted With Precision and Serves Important Purposes 10

B. A Title VII Cause of Action Accrues and Section 706(e)'s Limitations Period Is Triggered By a Discrete Adverse Employment Act 14

C. Title VII's Notice Accrual Rule Is Consistent With The Traditional Federal Discovery Accrual Rule 22

1. The Traditional Federal Discovery Accrual Rule Applies To Cases Arising Under the NLRA 23

2. The Court Has Rejected Less Demanding Accrual Rules In the Context of Civil RICO Cases .. 25

D. The Ninth Circuit's "Sufficiently Related" Test Ignores Title VII's Notice Accrual Rule 29

II THE CONTINUING VIOLATION DOCTRINE IS APPLICABLE, IF AT ALL, ONLY IN CASES INVOLVING HOSTILE ENVIRONMENT CLAIMS 30

A. Equitable Tolling Doctrines, Including the Continuing Violation Doctrine, Extend the Limitations Period In Rare Cases 31

B. The Continuing Violation Doctrine Should Apply Only In Hostile Environment Cases Where The Plaintiff Reasonably Did Not Know The Conduct Was Discriminatory Or Where The Discriminatory Nature Of The Conduct Is Recognized As Discriminatory Only In Light Of Later Occurring Events 38

1. The "Notice" Limitation On The Continuing Violation Doctrine Is Consistent With The Notice Accrual Rule, Effectuates Title VII's Remedial Purpose Of Eradicating Discrimination, And Results In Predictable Outcomes 40

2. The Ninth Circuit's "Sufficiently Related" Test Cannot Be Reconciled With The Court's Application Of The Notice Accrual Rule In Title VII Cases, Undermines Title VII's Remedial Purpose of Eradicating Discrimination, and Yields Unpredictable Results 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . 24, 28

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... *passim*

Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993) 32

Amini v. Oberlin Coll., ___ F.3d ___, 2001 WL 867422 (6th Cir. Aug. 2, 2001) 15, 32

Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999) 7, 47

Ansom v. Hiram Walker & Sons, Inc., 248 F.2d 380 (7th Cir. 1957) 23, 24

Armco Inc. v. NLRB, 83 F.3d 357 (6th Cir. 1988) 23

Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995) 15

Baldwin County Welcome Center v. Brown, 466 U.S. 147(1984) 32, 33

Bazemore v. Friday, 478 U.S. 385 (1986) 8, 19, 21

Benson v. General Motors Co., 716 F.2d 862 (11th Cir. 1983) 23

Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983) 6, 39, 45, 46

TABLE OF AUTHORITIES—Continued

Page(s)

Bosley v. Merit Systems Protection Bd.,
162 F.3d 665 (Fed. Cir. 1998) 39

Bullington v. United Air Lines, Inc.,
186 F.3d 1301 (10th Cir. 1999) 15

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) 7, 28, 48

Burnett v. New York Central R.R., 380 U.S. 424 (1965) .. 12

Cada v. Baxter Healthcare Corp., 920 F.2d 446
(7th Cir. 1990) 32

Caminetti v. United States, 242 U.S. 470 (1917) 13

Cedeck v. Hamiltonian Federal Savings and Loan Ass'n,
551 F.2d 1136 (8th Cir. 1977) 31

Chardon v. Fernandez, 454 U.S. 6 (1981) ... 14, 30, 35, 36

Cox v. United States Gypsum Co., 409 F.2d 289
(7th Cir. 1969) 31

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) . 34

Dasgupta v. University of Wisconsin Bd. of Regents,
121 F.2d 1138 (7th Cir. 1997) 44

Delaware State Coll. v. Ricks, 449 U.S. 250 (1981) .. *passim*

Draper v. Coeur Rochester, Inc., 147 F.3d 1104
(9th Cir. 1998) 7, 47

TABLE OF AUTHORITIES—Continued

Page(s)

Dumas v. Town of Mt. Vernon, 612 F.2d 974
(5th Cir. 1980) 38

Exploration Co. v. United States, 247 U.S. 437 (1918) ... 22

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 28, 48

Fielder v. UAL Corp., 218 F.3d 973 (9th Cir. 2000),
petition for cert. pending, No. 00-1397 ..... *passim*

Fitzgerald v. Henderson, 251 F.3d 345
(2d Cir. 2001) 39, 40

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) .. 23, 28, 48

Galloway v. General Motors Serv. Parts Operations,
78 F.3d 1164 (7th Cir. 1996) ..... *passim*

Garrison v. Burke, 165 F.3d 565 (7th Cir. 1999) 44

Gebser v. Lago Vista School Dist., 524 U.S. 274 (1998) . 48

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 13

Griggs v. Duke Power Co., 401 U.S. 429 (1971) 28

Guaranty Trust Co. v. United States,
304 U.S. 126 (1938) 11

Hallstrom v. Tillamook Cty., 493 U.S. 20 (1989) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 20, 21

Harris v. Forklift Sys., 510 U.S. 17 (1993) 45

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) .. 30

High v. University of Minnesota, 236 F.3d 909 (8th Cir. 2000) 15

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 22

Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998) ... 15, 45

International Union of Electrical Radio Machine Workers, AFL-CIO v. Robbins & Myers, Inc., 429 U.S. 22 (1976) ..... *passim*

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 32, 33, 34

Johnson v. Railway Express, 421 U.S. 454 (1975) 10, 35, 36

Klehr v. A.O. Smith Corp., 52. U.S. 179 (1997) .... *passim*

Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607 (1st Cir. 2000) 43

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) ..... *passim*

Lorillard v. Pons, 434 U.S. 575, 581 (1978) 25

TABLE OF AUTHORITIES—Continued

Page(s)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7

Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) 7, 45

Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983) 23

Miller v. American Family Mutual Ins. Co., 203 F.3d 997 (7th Cir. 2000) 44

Mohasco Corp. v. Silver, 477 U.S. 807 (1980) 33

NLRB v. Don Burgess Constr. Co., 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979) 23

NLRB v. Pennwoven, Inc., 194 F.2d 521 (3d Cir. 1952) .. 24

NLRB v. Textile Machine Works, Inc., 214 F.2d 929 (3d Cir. 1954) 24

Order of Railway Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) . 12

O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) 31, 44

Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998) 42, 44

Richard v. McDonnell Douglas Co., 469 F.2d 1249 (8th Cir. 1972) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Roberts v. Gadsden Mem. Hosp., 835 F.2d 793, modified, 850 F.2d 1549 (11th Cir. 1988) 6

Rotella v. Wood, 528 U.S. 549 (2000) ..... *passim*

Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997) 15, 45

Sabree v. United Brotherhood of Carpenters and Joiners, Local No. 33, 921 F.2d 396 (1st Cir. 1990) .. 39, 41, 42

Speer v. Rand McNally & Co., 123 F.3d 658 (7th Cir. 1997) 44

Stewart v. Booker T. Washington Ins., 232 F.3d 844 (11th Cir. 2000) 15

Taylor v. FDIC, 132 F.3d 753 (D.C. Cir. 1997) 21

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) . *passim*

United States v. Kubrick, 444 U.S. 111 (1979) ... 12, 22, 27

United States v. Mottaz, 476 U.S. 834 (1986) 22

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 13

Urie v. Thompson, 337 U.S. 163 (1949) 22

West v. Philadelphia Electric Co., 45 F.3d 744 (3d Cir. 1995) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Williams v. City of New York, 2001 WL 770933 (S.D.N.Y. July 10, 2001) 15

Wilson v. Chrysler Co., 172 F.3d 500 (7th Cir. 1999) 44

Wilson v. Garcia, 471 U.S. 261 (1985) 26

Wood v. Carpenter, 101 U.S. 135 (1879) 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1970) 20, 21

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 13, 32

Constitution and Statutes

15 U.S.C. §§ 12-27 11

18 U.S.C. § 1961 *et seq.* 11

28 U.S.C. § 1254(1) 1

29 U.S.C. § 158 *et seq.* 11

29 U.S.C. § 160(b) 23

42 U.S.C. § 2000e-5(e)(1) ..... *passim*

42 U.S.C. § 2000e-5(e)(2) 10

42 U.S.C. § 2000e-5(f)(1) 11

Page(s)

45 U.S.C. § 153 3

Miscellaneous

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1 CALVIN CORMAN, LIMITATION OF ACTIONS § 6.5.2 (Supp. 1993) 14, 15

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C. MCCORMICK, LAW OF DAMAGES 127 (1935) 48, 49

Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law,* 79 TEX. L. REV. 531 (2000) 38, 43

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Page(s)

R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?,* 31 AM. BUS. L.J. 365 (1993) 38

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 232 F.3d 1008. The order of the court denying rehearing and rehearing en banc (Pet. App. 23a-24a) is unreported. The district court's opinion granting partial summary judgment to petitioner (Pet. App. 25a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2000. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on January 22, 2001. Pet. App. 23a-24a. The petition for writ of certiorari was filed on April 23, 2001, and was granted on June 25, 2001. J.A. 11a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

1. Petitioner is the National Railroad Passenger Corporation, colloquially known as "Amtrak." Respondent Abner J. Morgan, Jr. ("Morgan"), an African-American male, worked at Amtrak from August 1990 to March 1995, and filed

his only administrative charge alleging violations of Title VII on February 27, 1995. The question before this Court is whether Morgan's EEOC charge allows him to bring suit only on the events that occurred within the 300 days preceding February 27, 1995, or instead allows him to reach back to the entire period of his employment with Amtrak. The district court dismissed all the counts of the complaint based on time-barred incidents, but held a jury trial – at which Amtrak prevailed – on the allegations that stated a claim for violation of Title VII during the 300 days preceding February 27, 1995. The Ninth Circuit reversed, holding that a jury could conclude that all of the incidents were part of a "continuing violation."

Morgan began working at Amtrak in August 1990 as an electrician's helper in the Oakland Maintenance Yard (the "Yard"). Pet. App. 7a. Morgan claimed that he believed that he was being hired as an electrician, that he performed the work of an electrician, and that less qualified Caucasians were hired as electricians. *Ibid.* According to Morgan, his job was not reclassified, nor was his pay increased, until April 1992. *Ibid.*

Morgan claims that, shortly after he began working at Amtrak, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by a group of Amtrak managers, specifically Robert Vandenburg, the Facility Manager of the Yard, Jerry Denton, Mike Bordenave, Ray Borge, and Earl Geske. Pet. App. 6a. That conduct allegedly continued throughout his employment with Amtrak and culminated in his termir.ation in March 1995. *Ibid.*

Morgan testified that the first discriminatory act occurred in February 1991, when he was charged with violating a disciplinary rule for refusing to attend a meeting without union representation. Pet. App. 7a. Under applicable work rules, an employee is entitled to union representation at any meeting that might lead to disciplinary action. *Id.* at 7a n.4. Morgan was ordered to attend a meeting with Vandenburg and Denton the

day after he had called in sick. Believing that the meeting might lead to disciplinary action, Morgan refused to attend. On March 22, 1991, following a full investigatory hearing into the incident, Morgan was terminated. *Ibid.*[1] The termination later was reduced to a ten-day suspension, and Morgan received backpay for all but ten days. *Ibid.*

Morgan claims that he requested entrance into the electrician apprentice program in August 1991. Pet. App. 7a-8a. He claims that he received no official response from Amtrak's personnel office, but that Vandenburg told him that he stood "a snowball's chance in hell of becoming an electrician." *Id.* at 8a.

Morgan recognized early in his employment that the alleged conduct of his supervisors and co-workers could be grounds for legal action. In October 1991, following the termination/suspension and the alleged denial of training, Morgan first complained about racial discrimination at Amtrak. Pet. App. 8a. Morgan filed a written complaint with Amtrak's internal EEO office citing "blatant racism" and offering specific instances of allegedly discriminatory conduct. *Ibid.* He sent a copy of that letter to Congressman Ron Dellums. *Ibid.* Morgan testified that he never received a formal response to his complaint. *Ibid.*

Throughout the remainder of Morgan's employment at Amtrak, he continued to make complaints of racial discrimina-

---

[1] Morgan's employment was covered by a collective bargaining agreement. Pet. App. 27a. Therefore, before he could be disciplined for rules infractions, he was entitled to be notified of the charges against him and to have a full investigatory hearing at which he would be represented by his union and could present evidence and cross-examine witnesses. *Id.* at 27a n.4. The hearing is conducted by a Hearing Officer, who determines whether the charges are proven. If the charges are proven, the Hearing Officer's decision is forwarded to the department head, who imposes discipline. *Ibid.* These determinations are subject to multi-layered review and ultimately can be appealed to the National Railroad Adjustment Board established by Section 3 of the Railway Labor Act, 45 U.S.C. § 153.

tion and retaliation both internally to Amtrak's EEO office and externally. Morgan and a group of other Amtrak employees met with Congresswoman Barbara Boxer to express their concerns about discriminatory conditions at the Yard in late 1991. Pet. App. 8a. In response to the complaint, Congresswoman Boxer contacted Amtrak's Inspector General, Fred Weiderhold. *Id.* at 40a. Weiderhold visited the Yard three times in 1992. *Ibid.* On one of those occasions, Weiderhold met Morgan. *Ibid.* Morgan claims that he "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to [Weiderhold's] attention." *Ibid.*

Morgan also continued to complain about racial discrimination to Amtrak's EEO office. In May 1993, Morgan filed two separate internal complaints alleging racial discrimination and retaliation with Amtrak's EEO office. Pet. App. 29a, 30a. Morgan claimed that in October 1993 Vandenburg assaulted him by placing his hands on Morgan's shoulders, pushing down, and whispering in his ear. *Id.* at 10a. Morgan reported the alleged assault to the police and filed a formal complaint with Amtrak's EEO office. *Id.* at 31a. Morgan testified that Amtrak did not investigate his complaint. In January 1994, Morgan again complained about racial discrimination to Amtrak's EEO office following the cancellation of scheduled training. *Id.* at 11a. Again, Morgan claims that Amtrak did not formally respond to the complaint. *Ibid.* In October 1994, Morgan made his last complaint of racial discrimination to Amtrak's EEO office and again, according to Morgan, no response was forthcoming. *Ibid.* In sum, by the time Morgan was suspended in February 1995 and terminated in March 1995, he had complained about racial discrimination or retaliation at least nine times over the course of four years.

Morgan claims that he was subjected to discriminatory or retaliatory discipline on at least ten occasions between October 1991 and the end of his employment in March 1995. Pet. App. 8a-12a. The discipline consisted of being issued written and

oral counselings; being charged, allegedly unfairly, with rules violations; being suspended; and ultimately having his employment terminated. In addition, he claims that he was unfairly denied training on four occasions.

Although Morgan believed that the alleged conduct was discriminatory and unlawful, he nevertheless refrained from filing an administrative charge until February 27, 1995, two days after he was suspended. Pet. App. 13a. At that time, he filed a charge alleging discrimination and retaliation with the EEOC and cross-filed with the California Department of Fair Employment and Housing. *Ibid.* On March 3, 1995, following a full investigatory hearing, Morgan was terminated. *Id.* at 12a. On March 8, 1995, Morgan amended his charge to allege that this termination constituted unlawful discrimination and retaliation. *Id.* at 37a. At the time he filed his administrative charge in February 1995, only six allegedly discriminatory incidents fell within the 300-day limitations period (May 3, 1994, to February 27, 1995).

2. The district court granted partial summary judgment in Amtrak's favor on all acts of alleged discrimination that occurred more than 300 days before Morgan filed his administrative charge of discrimination. Pet. App. 38a-40a. The court also granted partial summary judgment on three of Morgan's six timely claims of alleged discrimination: (1) denial of pay for jury duty in June 1994 and January and February 1995, (2) denial of access to review his work file in December 1994, and (3) denial of union representation during a December 1994 meeting; the court ruled that Morgan failed to establish a prima facie case of discrimination with respect to each of those claims. *Id.* at 49a-50a, 51a. The court held that Morgan failed to establish a prima facie case of discrimination for denial of pay for jury duty becau e he offered no evidence that the action was discriminatory or retaliatory. *Id.* at 49a-50a. The court held that Morgan failed to establish a prima facie case of discrimination relating to the alleged refusal to allow him to review his work

file because he could not identify an adverse employment action flowing from that denial. *Id.* at 51a. The court also held that Morgan could not recover for the alleged denial of union representation at a December 1994 meeting because he never addressed that claim in his opposition to Amtrak's summary judgment motion. *Ibid.*

In rejecting Morgan's argument that the "continuing violation doctrine" resuscitated all of his claims dating back to 1991, the district court relied on *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, modified, 850 F.2d 1549 (11th Cir. 1988); and *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). Pet. App. 38a-40a. The court, quoting *Galloway*, held that a plaintiff may not base a suit on conduct that "occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations." *Id.* at 39a (quoting 78 F.3d at 1167). The court held that Morgan was not entitled to invoke the continuing violation doctrine because as early as 1991 he claimed to be the victim of discrimination and retaliation by Amtrak and yet he did not file his administrative charge until 1995. *Id.* 39a-40a. The court did, however, permit Morgan to present evidence at trial of acts occurring before the limitations period to the extent they were relevant to his timely claims of discrimination and retaliation. *Id.* 40a n.9.

The remaining claims of alleged discrimination – suspension in September 1994, denial of training in October 1994, suspension in February 1995, and termination in March 1995 – were tried before a jury. Pet. App. 13a. During the trial, Morgan introduced evidence spanning the entire period of his employment at Amtrak. The jury returned a unanimous verdict in favor of Amtrak. *Ibid.*

3. The court of appeals reversed the district court's grant of partial summary judgment, holding that the lower court erroneously relied on *Galloway* to reject Morgan's reliance on the continuing violation doctrine. Pet. App. 15a. The Ninth Circuit did not cite a single decision of this Court dealing with limitations issues.[2] But the Ninth Circuit held that *it* "has never adopted a strict notice requirement as a litmus test for application of the continuing violation doctrine." *Ibid.* Citing its own decisions in *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999), and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1007 (9th Cir. 1998), the court of appeals stated that the only relevant inquiry in determining whether the continuing violation doctrine applies is whether the pre-limitations conduct at issue is "sufficiently related" to the post-limitations conduct. Pet. App. 16a. Using that test, the court of appeals analyzed Morgan's "three distinct Title VII claims": "discrimination, hostile environment, and retaliation." *Id.* at 17a. "In light of the totality of the circumstances" (*id.* at 18a), the court held that Morgan could rely on the continuing violation doctrine with respect to each of his three claims. *Id.* at 18a-20a. The court of appeals vacated the grant of partial summary judgment and the judgment on the

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[2] The only decisions of this Court that the Ninth Circuit cited at all (Pet. App. 18a, 19a) were *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which deals with the framework for evaluating discrimination claims, and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), which was the first case in this Court to deem harassment actionable "discrimination" under Title VII. In the principal predecessor to the decision below, *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), petition for cert. pending, No. 00-1397, the majority opinion cited only one decision of this Court, *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *cited at* 218 F.3d at 984. The dissent in *Fielder*, by contrast, relied heavily on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1981), which does deal with Title VII's statute of limitations. *See* 218 F.3d at 991, 999-1000 (Kleinfeld, J., dissenting).

verdict and granted Morgan a new trial on all three of his claims. *Id.* at 22a.

SUMMARY OF ARGUMENT

The limitations period in Section 706(e) runs from the date of a discrete allegedly discriminatory act, not from the date the last effect of that act is felt. In multiple Title VII cases, this Court has upheld a statute-of-limitations defense against employees who brought an EEOC charge or filed suit within the requisite time period after some adverse action, but sought to challenge an earlier, related act as discriminatory. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *superseded on other grounds by* 42 U.S.C. § 2000e-5(e)(2); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1981); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Int'l Union of Elec. Radio Mach. Workers, AFL-CIO v. Robbins & Myers, Inc.*, 429 U.S. 22 (1976). The result should be no different here.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the plaintiffs did prevail over a statute-of-limitations defense, but on grounds not applicable here. The discriminatory salary structure at issue in that case resulted in a new violation of Title VII with each week's paycheck. The statute of limitations thus constantly began to run anew. Similarly, the statute of limitations begins to run anew in antitrust cases every time a transaction takes place at a fixed price, even if the price-fixing agreement was reached many years ago. But the damages are still limited by the statute of limitations, and events that took place before the limitations period have no present legal consequences.

This accrual rule that a statute of limitations begins to run no later than the time when the plaintiff has notice of his injury is applied under many statutes. Most pertinent here is its consistent application under the National Labor Relations Act, on which Title VII's limitations provision was patterned. Indeed, the rule was settled under the NLRA at the time Title VII was passed, making it particularly apparent that the rule is incorporated into Section 706(e). Recent decisions of this Court under civil RICO likewise show that the Ninth Circuit went too far and that statutes of limitations have consequences when plaintiffs sleep on their rights. The Ninth Circuit's "sufficiently related" test, by contrast, attaches no limitations consequence to the various discrete acts of which Morgan now belatedly complains. It cannot be reconciled with this Court's cases.

A continuing violation doctrine does, however, have a proper role to play in some Title VII cases. In some hostile environment cases, only over time will the employee's treatment rise to the level of actionable conduct. Those are archetypal "continuing violations," in which the employee truly is blameless for not bringing suit earlier. The equitable tolling principles that this Court has read into all statutes of limitations, including Title VII's, in the absence of a contrary direction from Congress are a vehicle to allow such plaintiffs to sue on events occurring more than 300 days before they filed an EEOC charge, though the use of those principles must be sparing and must not protect those who have knowingly failed to file sustainable claims on a timely basis.

Three approaches to the continuing violation doctrine have developed in the lower courts. One approach, championed particularly by the First and Seventh Circuits, best comports with these principles and should be adopted by this Court. That approach provides great predictability without denying relief – either as a theoretical matter or, as case law shows, as a practical matter – to those deserving plaintiffs who did not sleep on their rights. Furthermore, by providing employees with an incentive to act quickly after violations occur, it serves Title VII's primary purpose of eradicating discrimination from the workplace. The Fifth Circuit's multi-factor approach likewise soundly emphasizes the plaintiff's diligence, and thus is far more consistent with this Court's decisions than the Ninth Circuit's approach, but does not provide the same desirable predictability as does the approach of the First and Seventh Circuits. Nor is

it clear that anything is gained from the Fifth Circuit's approach, since its factors other than notice boil down to the same things taken into account in defining the substantive violation of Title VII. The Ninth Circuit's approach, under which it is irrelevant that the plaintiff did not act diligently, has nothing to be said for it except that it prevents (old) Title VII violations from going unremedied. But that "benefit" is nothing more than naked hostility to the whole limitations concept, and thus cannot be reconciled with either Congress's decision to place a limitations period in Title VII or this Court's many decisions recognizing the important interests that statutes of limitations serve.

ARGUMENT

I. IN A TITLE VII CASE, A CAUSE OF ACTION ACCRUES AND SECTION 706(e)'s LIMITATIONS PERIOD RUNS FROM THE DATE OF THE DISCRETE ALLEGEDLY DISCRIMINATORY ACT

A. Section 706(e) Was Drafted With Precision And Serves Important Purposes

Title VII was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It creates a comprehensive statutory system to vindicate civil rights. *Johnson v. Ry. Express*, 421 U.S. 454, 455 (1975). That system includes a limitations period: Section 706(e). Section 706(e) requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency before proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time barred unless the employee files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful occurrence, or within 300 days of the allegedly unlawful occurrence if the employee first files the charge with a state or local agency, as respondent did in this case. *Ibid; United Air Lines, Inc. v.*

Evans, 431 U.S. 553, 555 n.4 (1977) ("[t]imely filing is a prerequisite to maintenance of a Title VII action"). If, after 180 days, the EEOC is not successful in obtaining voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee may demand a right-to-sue letter and institute a private action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee must institute the lawsuit within 90 days after receiving the right-to-sue letter or lose his claim. *Alexander*, 415 U.S. at 47.

The Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period. There is no statutory basis for this interpretation of Section 706(e). Moreover, the lower court's decision conflicts with the rule that a Title VII cause of action accrues and the limitations period begins to run when a discrete allegedly discriminatory act occurs. This notice accrual rule is implicit in the Court's cases applying Section 706(e)'s limitation period, is derived from the traditional federal discovery accrual rule, and is consistent with the discovery accrual rule applied in the context of other remedial statutes, including the Clayton Act, 15 U.S.C. §§ 12-27, civil RICO, 18 U.S.C. § 1961 *et seq.*, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 *et seq.*

It is fair to say that the Ninth Circuit's decision in this case, and the Ninth Circuit precedents on which it relies, demonstrate – if not outright hostility to the limitations defense – at least a lack of enthusiasm for allowing limitations to get in the way of what might be an otherwise meritorious claim by a plaintiff. But this Court has consistently shown a very different attitude. Statutes of limitations have been characterized as a "meritorious defense, in itself serving a public interest." *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938). "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice" of the right

to defend himself. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). Statutes of limitations are "statutes of repose" that balance plaintiffs' needs for sufficient time to pursue claims with defendants' and courts' rights to be free of stale claims. *Id.* at 117; *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965); *Order of Ry. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

This Court has described the purposes behind statutes of limitations as "promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. * * * [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Ry. Telegraphers*, 321 U.S. at 348-49; *see also Kubrick*, 444 U.S. at 124 ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."). This Court's decisions have instructed that statutes of limitations in general, and Section 706(e) in particular, are to be strictly enforced, subject only to narrow exceptions that apply when consistent with the overall purpose of the statute.

Congress defined Title VII's jurisdictional prerequisites "with precision." *Alexander*, 415 U.S. at 47. An EEOC charge must be filed within the specified number of days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The sole textual extension of Section 706(e)'s limitations period – undisputedly applicable here, but in no way supportive of the Ninth Circuit's holding – occurs when the "person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from"

the alleged discriminatory practice. 42 U.S.C. § 2000e-5(e)(1); *Robbins & Myers, Inc.*, 429 U.S. at 240.

When a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (holding the terms of the statute applicable because this "is not one of the rare cases in which 'the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters'"); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 28 (1989) (noting that the words of the statute are conclusive). The language of Section 706(e) is plain – it provides that a charge of discrimination "shall be filed" with the EEOC within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). As this Court noted, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom*, 493 U.S. at 31.[3]

Thus, to assess the timeliness of an administrative charge challenging an allegedly unlawful employment practice, courts are required to identify the complained-of unlawful employment practice with precision. *Lorance*, 490 U.S. at 904. In cases in which a discrete act such as a termination, failure to promote, denial of transfer, or refusal to hire occurs, identifying the "alleged unlawful employment practice" (42 U.S.C. § 2000e-5(e)(1)) is simple, and the limitations period runs from the date

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[3] However, most statutes of limitations – and Title VII's in particular – are not "jurisdictional." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, even if the discrete act triggering the limitations period has been correctly identified and the plaintiff did not sue or file an administrative charge within the statutory period, waiver, estoppel, or equitable tolling may excuse the untimely filing. *Ibid.* There is no contention, however, that waiver or estoppel has any relevance to this case or to "continuing violation" cases in general. The applicability of principles of equitable tolling to "continuing violation" cases is explored in Part II, *infra*.

of the discrete act. In hostile environment cases in which there is no discrete allegedly discriminatory act, we submit that the cause of action accrues and the limitations period runs, at the latest, from the time when the employee knew or should have known of acts sufficient to constitute a violation of Title VII.[4]

B. A Title VII Cause Of Action Accrues and Section 706(e)'s Limitations Period Is Triggered By A Discrete Adverse Employment Action

1. The Court repeatedly has ruled that Section 706(e)'s limitations period runs from the date of the discrete allegedly discriminatory act, not from the date the last effect of that act is felt. *Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 257-58; *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) ("the proper focus is on the time of the discriminatory act, not at the point at which the *consequences* of the act become painful"); *Robbins & Myers*, 429 U.S. at 234; 2 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1349 (3d ed. 1996) (this Court's cases "seem to establish a relatively simple 'notice' rule as to when discrimination 'occurs' (so as to start the running of the charge-filing period)"); *see also* 1 CALVIN CORMAN, LIMITATION OF ACTIONS § 6.5.2 (Supp. 1993) ("In determining the date

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[4] This case presents no occasion to choose between an "injury" rule of accrual and an "injury discovery" rule of accrual in the Title VII context. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196-202 (1997) (Scalia, J., concurring in part and concurring in the judgment) (advocating rejection of "injury discovery" rule in RICO context in favor of "injury" accrual rule derived from Clayton Act). There is no allegation of any time lag between any allegedly unlawful acts and respondent's discovery of them, so the dates of accrual would be the same under either rule. Indeed, it would be the rare Title VII case (and one probably resolvable under the doctrine of equitable tolling) in which an employee suffered discrimination or harassment but was unaware of it. Accordingly, the distinction between "injury" and "injury discovery" accrual rules, much debated in this Court's RICO cases, has played little or no role in the development of Title VII limitations jurisprudence in the lower courts.

of accrual of the cause of action, a distinction must be made between Title VII employment discrimination and breach of an at-will employment contract. In the former, the wrongful act * * * is the time of the commission of the unlawful act of discrimination, regardless of whether loss of employment ensues as a result thereof."). Accordingly, this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim.[5]

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[5] With the exception of the Ninth Circuit, the courts of appeals have followed this Court's precedents and have held that discrete acts trigger the running of Title VII's limitations period even when plaintiff alleges subsequent discriminatory acts. *See, e.g., Amini v. Oberlin Coll.*, ___ F.3d ___, 2001 WL 867422, *4 (6th Cir. Aug. 2, 2001) ("we reaffirm our practice of running the Title VII and ADEA limitations provisions from the date on which the alleged discriminatory act * * * was communicated to the plaintiff"); *High v. Univ. of Minnesota*, 236 F.3d 909 (8th Cir. 2000) (failure to promote is a discrete event triggering the limitations period); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000) (precluding use of continuing violation doctrine as denial of transfer is a discrete event triggering the limitations period); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999) (refusal to hire is a discrete event triggering limitations period; claim could not be revived by combining it with timely refusal-to-hire claim); *Huckabay v. Moore*, 142 F.3d 233, 239-40 (5th Cir. 1998) (preventing combining stale demotion and failure-to-promote claims with timely harassment claims as "demotion is the sort of discrete and salient event that should put an employee on notice that a cause of action has accrued"); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483-84 (3d Cir. 1997) (failure to promote and denial of training are discrete events that "cannot be regarded as having been timely by reason of [plaintiff's] other allegations of discriminatory treatment"); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc); *see also Williams v. City of New York*, 2001 WL 770933, at *3 (S.D.N.Y. July 10, 2001) ("Transfers, demotions, and failures to promote are considered completed, discrete acts that do not constitute continuing violations. Any holding to the contrary would read the statute of limitations period out of the statute.") (citations omitted); *cf. West v. Philadelphia Electric Co.*, 45 F.3d 744, 756 (3d Cir. 1995) ("[T]he harassment did not cause a discrete event such as a lost job or a denied promotion and, thus, it did not trigger a duty of the

This Court articulated the notice accrual rule in the Title VII context in *United Air Lines, Inc. v. Evans*, 431 U.S. 553. The plaintiff in *Evans* was terminated pursuant to a discriminatory "no-marriage" policy for female flight attendants. *Evans*, 431 U.S. at 554. Although the policy was facially discriminatory, the plaintiff did not file an administrative charge following her dismissal. *Id.* at 555. The discriminatory policy was later abolished, and the plaintiff was re-hired. She was not credited with seniority for her prior service, however, because of a provision in the collective bargaining agreement that seniority was irrevocably lost when an employee resigned or was terminated for cause. *Id.* at 555 n.6. The plaintiff argued that the seniority system gave present effect to past discrimination and therefore, constituted a continuing violation. *Id.* at 558. The Court rejected that argument, holding that "the critical question is whether any present violation exists." *Ibid.* The Court described the plaintiff's earlier termination as "merely an unfortunate event in history which has no present legal consequences." *Ibid.*

In *Robbins & Myers*, the plaintiff believed that she was fired because of her race in violation of both the applicable collective bargaining agreement and Title VII. She promptly filed a grievance with the union alleging unfair action, but waited until after the expiration of Title VII's limitations period to file her charge with the EEOC. 429 U.S. at 229. The plaintiff conceded that filing her grievance did not prevent her from immediately filing an EEOC charge. *Id.* at 238 n.10. She argued, however, that her charge was timely filed because the alleged unlawful employment practice occurred at the conclusion of the grievance-arbitration proceedings, not on the date of her termination. *Id.* at 238. This Court rejected the plaintiff's argument, holding that the accrual date for purposes of the limitations period was the date of her termination. *Id.* at 234-35.

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plaintiff to assert his rights arising from the deprivation.").

Likewise, in *Ricks*, this Court rejected a plaintiff's attempt to use the continuing violation doctrine to extend the limitations period to resuscitate his time-barred discrimination claim. 449 U.S. at 257-58. In *Ricks*, a black Liberian college professor was denied tenure in February 1973. *Id.* at 252. Following a denial of an appeal of the tenure decision, the college's Board of Trustees offered Ricks a one-year terminal contract. *Id.* at 253. Ricks accepted the contract and worked until its expiration in June 1975. *Id.* at 253-54. In April 1975, Ricks filed a charge with the EEOC alleging discrimination based on national origin. *Id.* at 254. The district court held that Ricks's claim was time barred because the denial of tenure occurred more than 180 days before the filing of the EEO charge. *Id.* at 254-55. The court of appeals reversed the district court, holding that the limitations period did not begin to run until June 1975 upon the expiration of the one-year contract. *Id.* at 255-56. This Court in turn reversed and held that, for purposes of the limitations period, the inquiry must focus on the date of the allegedly unlawful conduct – the denial of tenure. *Id.* at 256-57. This Court held that the limitations period normally commences when the employer's decision is made, even when the effects of that decision linger for some time. *Id.* at 261.

In *Lorance*, the Court applied Section 706(e)'s limitations period to bar claims brought by female employees challenging AT&T's alleged discriminatory seniority system. 490 U.S. at 905. To determine when the limitations period began running, the Court analyzed plaintiffs' claims and held that the complained-of unfair employment practice was the adoption of the facially neutral seniority system in 1979. *Id.* at 904-05. The seniority system neither treated similarly situated employees differently nor had been operated in an intentionally discriminatory manner. *Id.* at 905. The plaintiffs asserted, however, that the purpose of its adoption in 1979 was "to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs." *Id.* at 903 (internal quotation

marks omitted). The female employees did not file charges with the EEOC until 1983, when they themselves were demoted as a result of the application of the seniority system adopted in 1979. *Id.* at 902. The employees argued that their charges were timely filed because they filed within 300 days of being demoted. The Court rejected that argument and held that the employees' claims were time barred because they failed to file charges within 300 days of the adoption of the allegedly discriminatory seniority system. *Id.* at 905-06.

The Court "recognized, of course, that it is possible to establish a different theoretical construct: to regard the employer as having been guilty of a continuing violation which 'occurred,' for purposes of § 706(e), not only when the contractual right was eliminated but also when each of the concrete effects of the elimination was felt." 490 U.S. at 906. But "[t]he answer" to that approach was "that our cases have rejected" it. *Ibid.*; *see also* 490 U.S. at 913 (Stevens, J., concurring) ("the Court has correctly applied" its precedents "to the case at hand"). "*The continuing violation theory is contradicted most clearly*," this Court stated, by *Ricks* and *Evans*. 490 U.S. at 906 (emphasis added).

One struggles in vain to figure out why Ms. Evans, Ms. Guy (the complainant in *Robbins & Myers*), Professor Ricks, and Ms. Lorance lost substantial rights by not filing an EEOC charge within the statutory period after the discriminatory events affecting them, yet Mr. Morgan (according to the Ninth Circuit) lost nothing by failing to follow up with a timely EEOC charge after "alleged unlawful employment practice[s] occurred" (42 U.S.C. § 2000e-5(e)(1)) in 1991 and 1993. The distinction cannot be merely that "sufficiently related" (Pet. App. 16a) conduct occurred later, because each of the losing plaintiffs in this Court's earlier cases filed an EEOC charge within the statutory period following employer conduct closely related to the actions of which they complained.

2. Plaintiffs do not always lose limitations cases in this Court. When they do win, however, there is a reason other than hostility to the limitations defense. In particular, defendants have been known to overreach in their identification of the discrete event that triggered the plaintiff's duty to file in certain cases (or to advance meritless objections to the application of equitable tolling, *see* Part II, *infra*). The limitations cases in which plaintiffs have prevailed, however, lend no support to the Ninth Circuit's "continuing violation" theory.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court held that the defendants violated Title VII because they failed to eradicate all vestiges of a pre-Title VII discriminatory salary structure. The Court held that Title VII was violated by the issuance of each week's paycheck, stating, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 395.

Consistent with all the rest of this Court's jurisprudence, *Bazemore* demonstrates that a *new* violation triggers a *new* statute of limitations even if the violation is identical to, even rooted in, past practices that are themselves beyond challenge because of the statute of limitations – what Justice Stevens for the Court in *Evans* called "unfortunate event[s] in history which ha[ve] no present legal consequences," 431 U.S. at 558. That this is the correct interpretation of *Bazemore* can be seen from the language of the Court itself (identifying a recurring "wrong actionable under Title VII"); from the Court's subsequent refusal in *Lorance*, 490 U.S. at 912 n.3, to interpret *Bazemore* as support for allowing plaintiffs demoted in 1983 to challenge a seniority system adopted in 1979; and from this Court's antitrust jurisprudence, which identifies a theory of recurring wrongs exactly like the one applied in *Bazemore* yet explicitly contradicts the Ninth Circuit's theory in this case.[6]

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[6] Antitrust law has a particularly well-developed jurisprudence regarding

In antitrust, each separate violation triggers the limitations period on that separate violation. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1970); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968). Each overt act that is part of a violation and that injures the plaintiff starts the statutory limitations period running again regardless of the plaintiff's knowledge of the alleged illegality at earlier times. *Klehr*, 521 U.S. at 189 (quoting 2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 338b, at 145 (rev. ed. 1995)). In *Zenith*, 401 U.S. at 338-39 (*emphasis added*), the Court reiterated the basic accrual rule for a continuing or recurring violation:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. * * * In the context of a [continuing or recurring violation] this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act, and that, as to those damages, *the statute of limitations runs from the commission of the act*. * * * To recover those damages, he must sue within the requisite [time] from the accrual of the action.

This accrual rule is exemplified in *Hanover Shoe*. The plaintiff in *Hanover Shoe* filed suit in 1955, alleging that

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violations that have continued over an extended period of time. Accordingly, Professor Laycock soundly suggested some time ago that antitrust law's treatment of such "continuing violations" can serve as a guide for Title VII cases. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, LAW & CONTEMP. PROBS., Autumn 1986, at 53, 55 (1986) ("Part of the problem is that this debate [on the application of the continuing violation doctrine] has been carried on in a Title VII vacuum, without regard to continuing violation law in other substantive areas. There is a well-developed continuing violation jurisprudence, especially in antitrust law, and Title VII lawyers ought to look at it.").

United's restrictive system of distributing shoe machinery violated the antitrust laws. United argued that Hanover's claim was barred because it had applied the unlawful system to Hanover for more than forty years. 392 U.S. at 502 n.15. The Court concluded that, although United could not continue its unlawful conduct forever merely because it had gone unchallenged since before World War I, neither could Hanover recover for more than 40 years of damages. The Court held that the plaintiff could sue but could recover only for damages suffered during the limitations period. *Id.* at 502.

In *Bazemore* as in these antitrust cases, the result of applying the separate accrual rule was that each separate violation, *i.e.*, the issuance of each week's paycheck, gave rise to a cause of action and triggered Section 706(e)'s limitations period.[7]

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[7] It might clarify analysis to abandon the "continuing violation" terminology with respect to cases like *Bazemore* and *Zenith* and *Hanover Shoe* and refer instead to "recurring violations," saving usage of the phrase "continuing violation" for the types of cases discussed in Part II, *infra*. *But cf. Klehr*, 521 U.S. at 189 (referring to "a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years"). The *substance* – as opposed to the terminology – of this Court's antitrust jurisprudence makes it clear that calling something a "continuing violation" may defeat a statute-of-limitations defense if the plaintiff can identify *actual violations* that occurred within the limitations period, but *never* allows the plaintiff to resuscitate challenges to events that occurred before the limitations period. *See also Lorance*, 490 U.S. at 912 n.3 ("a facially discriminatory system * * * by definition discriminates *each time* it is applied") (emphasis added). True "continuing violations," such as patterns of harassment that develop over time and become actionable only once they cross a threshold of severity or pervasiveness, have different legal consequences. *See Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (Williams, J.) ("For statute of limitations purposes, a continuing violation is 'one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period,' typically because it is only its cumulative impact (as in the case of a hostile work environment) that reveals its illegality.") (citations omitted).

That result is consistent with the Court's holdings in *Evans*, *Robbins & Myers*, and *Ricks*. The notice accrual rule is also consistent with the traditional federal discovery accrual rule that is grafted onto statutes of limitations in federal question cases in the absence of a contrary directive by Congress.

C. Title VII's Notice Accrual Rule Is Consistent With The Traditional Federal Discovery Accrual Rule

Title VII's notice accrual rule is an iteration of the traditional federal discovery accrual rule. *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (federal courts generally apply a discovery accrual rule when a statute is silent on the issue); *see Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (claim for equitable relief under the Federal Farm Loan Act); *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under the Quiet Title Act); *Kubrick*, 444 U.S. 111, 120-22 & n.7 (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949)(claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 437, 447 (1918) (bankruptcy fraud claim). The discovery component of the federal accrual rule is tied to discovery of the injury, not to discovery of each element of a claim. As the Court explained in *Rotella*, 528 U.S. at 555, "in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of other elements of a claim, is what starts the clock." In a Title VII case, generally because of the nature of the discrete acts involved – termination, demotion, failure to promote – the plaintiff's knowledge of his injury is contemporaneous with his knowledge of the discrete allegedly discriminatory act. *See* note 4, *supra*. It is particularly relevant that this traditional discovery accrual rule is applied in National Labor Relations Act cases because Title VII's remedial provisions are based on the NLRA's parallel provisions.

1. The Traditional Federal Discovery Accrual Rule Applies To Cases Arising Under The NLRA

Title VII's remedial provisions, including Section 706(e)'s limitations period, are expressly modeled on the analogous remedial provisions in the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(b); *Lorance*, 490 U.S. at 909-10; *Zipes*, 455 U.S. at 394-95. Reliance on NLRA decisions is particularly appropriate in interpreting Section 706(e)'s limitations period, "since the highly unusual feature of requiring an administrative complaint before a civil action can be filed against a private party is common to both statutes." *Lorance,* 490 U.S. at 909 (noting that the NLRA's limitations period is "substantially similar" to Title VII's limitations period). Thus, principles developed under the NLRA provide guidance on interpreting Title VII. *Lorance*, 490 U.S. at 909; *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982).

Under the NLRA, the courts apply the traditional federal discovery accrual rule that the limitations period begins to run when the employee knew or in the exercise of reasonable diligence should have known of the acts constituting the alleged violation. *Armco Inc. v. NLRB*, 83 F.3d 357, 362 (6th Cir. 1988); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983); *Benson v. Gen. Motors Co.*, 716 F.2d 862, 864 (11th Cir. 1983) ("For the purpose of determining when the [NLRA] §10(b) period begins to run, we look to when plaintiffs either were or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations"); *NLRB v. Don Burgess Constr. Co.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). In instances in which a discrete act such as a discharge or discriminatory refusal to reinstate is at issue, the NLRA's limitations period runs from the date of that act. *Ansom v. Hiram Walker & Sons, Inc.*, 248 F.2d 380, 382 (7th Cir. 1957); *NLRB v. Textile*

Machine Works, Inc., 214 F.2d 929 (3d Cir. 1954); *NLRB v. Pennwoven, Inc.*, 194 F.2d 521 (3d Cir. 1952).

The plaintiffs in *Ansom* had been discharged three years before they filed a charge challenging the discharge. *Ansom*, 248 F.2d at 381. The Seventh Circuit rejected their attempt to rely on the continuing violation doctrine to save their claim of wrongful discharge, holding, "plaintiffs make a direct averment that they had been wrongfully discharged in 1952. Their cause of action arose then." *Id.* at 382.

Likewise, in *Pennwoven*, the Third Circuit rejected the plaintiffs' attempt to invoke a continuing violation doctrine based on a continuing tort theory akin to nuisance to save their claims of discriminatory refusal to reinstate. 194 F.2d at 524-25. Noting that "Congress inserted this limitation provision because there had been complaints that people were being brought to book upon stale claims," the court reasoned that permitting the plaintiffs to rely on a continuing violation doctrine would thwart the limitations provision because the employee's case then would "never be closed until it is finally litigated." *Ibid.* Thus, the court held that the limitations period began to run from the date that the employer refused to reinstate the employees and "they knew it and knew, or thought they knew, why they had not been called back." *Id.* at 525; *see also Textile Machine Works, Inc.*, 214 F.2d 929 (holding that claims of employees who sought reinstatement were barred, but permitting claims of applicants for employment that had been unlawfully denied employment during the limitations period to proceed).

The NLRA's discovery accrual rule was established before Congress passed Title VII. It can be assumed that Congress was aware of the rule and approved of its use in the Title VII context when it used the NLRA's remedial provisions as a model. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975) (assuming Congress was aware of the Board's provision of backpay when it used the NLRA's remedial provisions as a

model for Title VII); c*f. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("When * * * Congress adopts a new law incorporating a section of a prior law, Congress normally can be presumed to have knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Thus, application of the notice accrual rule to Title VII cases is grounded in the application of the discovery rule to NLRA cases.

2. The Court Has Rejected Less Demanding Accrual Rules In The Context of Civil RICO Cases

This traditional discovery accrual rule has been applied in the context of remedial statutes like Title VII. Indeed, the Court has held that the discovery accrual rule furthers the remedial purposes of statutes that encourage civil actions by individuals to supplement the government's efforts to deter or to eradicate unlawful behaviors. Accordingly, the Court has rejected less demanding accrual rules in the context of civil RICO claims, reasoning that such rules are inconsistent with the statute's remedial purpose.

In *Klehr* and *Rotella*, the Court addressed the appropriate accrual rule for civil RICO actions. In *Klehr*, the Court rejected plaintiffs' attempts to rely on a last-predicate-act rule of accrual to salvage their otherwise untimely civil RICO claim. *Klehr*, 521 U.S. 179. The dairy farmer plaintiffs in *Klehr* purchased a silo to store cattle feed from defendant in 1974. The plaintiffs claimed that they purchased the silo based on what later proved to be false representations about the fresh and healthful condition in which the silo would maintain the cattle feed. *Id.* at 183-84. The plaintiffs alleged that they discovered the poor state of the cattle feed stored in the silo and consequent falsehood of the representations by defendant in 1991, so that their action filed in 1993 was brought within the four-year limitations period. *Id.* at 185. This Court, however, held that the plaintiffs' suit was

untimely. The Court rejected the Third Circuit's last-predicate-act rule of accrual, which would have provided that the limitations period ran from the time the plaintiff knew or should have known of the *last injury or last predicate act* that is part of the pattern of racketeering. *Id.* at 186. That accrual rule – like the version of the continuing violation doctrine espoused by the Ninth Circuit in this case – permits a plaintiff to recover not only for harm caused by acts committed within the limitations period, but also for all acts that make up the total pattern of racketeering activity regardless of when he knew or in the exercise of due diligence should have known about the injury. *Id.* at 186-87.

"The Clayton Act help[ed]" the Court to decide *Klehr* "because it ma[de] clear precisely where, and how, the Third Circuit's rule [went] too far." 521 U.S. at 189. The Court compared the last-predicate-act accrual rule to continuing violation (or recurring violation) jurisprudence under the Clayton Act, noting that in antitrust cases the plaintiff cannot use a later predicate act as a bootstrap to recover injuries caused by earlier predicate acts that took place outside the limitations period. *Id.* at 189-90. Accordingly, the Court unanimously rejected the last-predicate-act accrual rule, reasoning that "the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait 'sleeping on their rights,' as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence lost.'" *Id.* at 187 (citing *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

In *Rotella*, the Court had a second opportunity to consider the appropriate accrual rule for causes of action in civil RICO. This time, the Court unanimously rejected the "injury-and-pattern-discovery" rule, under which a civil RICO claim accrues only when the claimant discovers or should have discovered both an injury and a pattern or RICO activity, in favor of the "injury discovery" rule under which a civil RICO claim accrues, at the latest, when a plaintiff knew or should have known of his

injury. 528 U.S. at 555. The Court rejected the injury-and-pattern-discovery rule because a pattern discovery rule – like the continuing violation doctrine applied by the Ninth Circuit in this case – would allow proof of defendant's acts that are remote from the time of trial and would foster "litigation even more at odds with the basic principles of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 554. The Court noted that a plaintiff who is aware of the fact of the injury has the responsibility to investigate and determine whether he should bring a claim within the limitations period. *Id.* at 556-57.

There is no basis for requiring of Title VII plaintiffs a lesser degree of responsibility to pursue claims promptly than is required of plaintiffs bringing actions to enforce civil RICO, antitrust laws, the FTCA, the NLRA, or any of the other federal statutes that apply the discovery accrual rule. *See Rotella*, 528 U.S. at 556-57; *Kubrick*, 444 U.S. at 122, 124. Indeed, there is less complexity in determining whether an employer's actions might be discriminatory than there is in discovering racketeering activity that by its very nature may be concealed (as in *Rotella*) or in identifying medical malpractice that may require resort to expert opinion (as in *Kubrick*). Nevertheless, the Court has adopted injury discovery rules in both these contexts. In *Rotella*, the Court reasoned that any less stringent accrual rule "would patently disserve the congressional objective of a civil enforcement scheme * * * aimed at rewarding the swift who undertake litigation in the public good." *Rotella*, 528 U.S. at 559. The challenged acts under Title VII are less complex than those challenged under civil RICO, and *a fortiori* there can be no justification for a less stringent accrual rule in Title VII cases.

Moreover, like civil RICO, Title VII primarily serves a remedial purpose. It is designed to eradicate employment discrimination by "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to

favor an identifiable group * * * over other employees." *Albemarle Paper Co.*, 422 U.S. at 417 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 429-30 (1971)); *Ford Motor Co.*, 458 U.S. at 227; 230. Compensation to victims of employment discrimination is "Title VII's secondary, fallback purpose." *Ford Motor Co.*, 458 U.S. at 230. To accomplish Title VII's primary deterrent goal, the Court has recognized that legal rules fashioned to implement Title VII should be designed to encourage employers to end discrimination, *id.* at 228, and has adopted such rules. *See, e.g.*, *Ford Motor Co.*, 458 U.S. 219 (recognizing rule that further accrual of backpay liability is tolled when the defendant offers the claimant the job originally sought); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998); *Ellerth*, 524 U.S. at 764 (recognizing an affirmative defense for employers in hostile environment sexual harassment cases where the hostile environment is caused by an immediate supervisor if the employer can demonstrate that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of corrective measures or otherwise avoid harm).

Strict application of statutory limitations periods is particularly appropriate in cases involving remedial statutes – like Title VII – because prompt filing of claims promotes the societal interests at the heart of these statutes. *See, e.g.*, *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in the enforcement process of Title VII. * * * [T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.") (citations omitted); *Rotella*, 528 U.S. at 558 ("[i]t would * * * be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize").

D. The Ninth Circuit's "Sufficiently Related" Test Ignores Title VII's Notice Accrual Rule

Under the Ninth Circuit's test, a plaintiff is permitted to recover damages for untimely claims provided that they are "sufficiently related" to any act occurring within the limitations period. Pet. App. 16a. The Ninth Circuit's "sufficiently related" test disregards the traditional accrual rules applicable to Title VII because it ignores the existence of a discrete act as the trigger for the running of the limitations period.

In this case, the first alleged act of discrimination occurred in February 1991, when Amtrak terminated Morgan. Pet. App. 7a. Shortly after that termination (which was reduced to a suspension), Morgan complained that he was the victim of racial discrimination and specifically cited the termination as an example of discrimination. *Id.* at 8a. The February 1991 termination triggered the running of Section 706(e)'s limitations period. Morgan, however, failed to file a timely charge. He did not file a charge until four years later.

Thus, the February 1991 termination – like the other discrete events that were not the subject of timely charges – "is merely an unfortunate event in history which has no present legal consequences," *Evans*, 431 U.S. at 558, and Amtrak "is entitled to treat the past act as lawful." *Ibid.* The Ninth Circuit, however, held that, because acts occurring within the limitations period were sufficiently related to untimely acts, Morgan should be permitted to recover damages for all past acts including the 1991 termination. Pet. App. 18a-20a. The result of the Ninth Circuit's "sufficiently related" test is that the notice accrual rule is abolished and the limitations period for discrete, allegedly discriminatory acts is extended indefinitely. The Ninth Circuit's "sufficiently related" test for a continuing violation cannot be

reconciled with *Evans*, *Ricks*, *Bazemore*, or the broader body of this Court's statute-of-limitations jurisprudence.[8]

II. THE CONTINUING VIOLATION DOCTRINE IS APPLICABLE, IF AT ALL, ONLY IN CASES INVOLVING HOSTILE ENVIRONMENT CLAIMS

Nearly every Title VII case involves some discrete allegedly discriminatory act that triggers the running of the limitations

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[8] Despite the reasons to apply statute-of-limitations jurisprudence across different statutory schemes, this Court has allowed Fair Housing Act statute-of-limitations jurisprudence to develop independently of its Title VII jurisprudence. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982), the Court addressed a "continuing violation" question without mention of its decision earlier the same Term in *Chardon v. Fernandez*, its decision the prior Term in *Delaware State Coll. v. Ricks*, its five-year-old decision in *United Air Lines v. Evans*, or its six-year-old decision in *Robbins & Myers*. Similarly, when the Court addressed an important Title VII statute-of-limitations issue in *Lorance*, the brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners, in footnote 14 and its accompanying text, invited the Court to link its Title VII and Fair Housing Act jurisprudence and asserted that "*Havens Realty* seems clearly to indicate" that the Title VII statute of limitations had not expired in that case. Yet the Court held that the statute of limitations *had* expired, and in so holding did not find it necessary to mention or distinguish *Havens Realty*. To the extent the two bodies of case law can or need to be reconciled, it appears that this Court conceives of the underlying violation in certain Fair Housing Act cases differently than it conceives of a Title VII violation. The Court afforded standing to certain plaintiffs in *Havens Realty* based on "an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff." 455 U.S. at 375. With respect to those "'neighborhood' claims," *id.* at 381, and only with respect to the neighborhood claims, the Court thought the violation to consist of "petitioners' continuing pattern, practice, and policy of unlawful racial steering" (*ibid.*) rather than any single act or even series of acts specifically directed against the plaintiffs. With respect to the plaintiff who did make untimely allegations of acts specifically directed against her, however, the Court actually reversed the decision of the court of appeals that had allowed her to proceed on a "continuing violation" theory. *Ibid.*

period. In rare cases, however, the Title VII violation is a hostile environment claim composed only of a pattern of harassment extending over time or a pattern of harassment that culminates in a discrete allegedly discriminatory act that apprises the employee for the first time that the prior conduct might have been discriminatory. *See, e.g., O'Rourke v. City of Providence,* 235 F.3d 713 (1st Cir. 2001); *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). These are archetypal "continuing violations." Title VII's notice accrual rule should be applied to these cases with the result that the cause of action accrues when an employee knows or in the exercise of reasonable diligence should have known that the acts constituted harassment. The application of the notice accrual rule to hostile environment claims, in some cases, will result in plaintiffs' being able to recover damages for acts that otherwise would be time barred. Consistent application of the notice accrual rule to hostile environment cases leads in most instances to the same results as application of the judicially created equitable tolling rule known as the continuing violation doctrine.

A. Equitable Tolling Doctrines, Including the Continuing Violation Doctrine, Extend The Limitations Period In Rare Cases

Shortly after the passage of Title VII, the courts began to recognize a judicially created continuing violation exception to Title VII's short limitations period in cases in which a defendant's conduct was deemed continuing in nature. *See, e.g., Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Richard v. McDonnell Douglas Co.*, 469 F.2d 1249 (8th Cir. 1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-91 (7th Cir. 1969). In these cases, the courts used the continuing violation doctrine to allow plaintiffs to recover based on acts that otherwise would be time-barred. The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have

been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993); *see also Zipes*, 455 U.S. at 393 (Section 706(e)'s limitations period is "subject to waiver, estoppel, and equitable tolling").

Equitable tolling doctrines, like the continuing violation doctrine, may be used to extend the limitations period in cases in which the limitations period has run before the plaintiff obtained information essential to deciding whether he had a claim. Note, *The Charge-Filing Requirements of The Age Discrimination in Employment Act: Accrual and Equitable Modification*, 91 MICH. L. REV. 798, 807-10 (1993) (discussing Supreme Court doctrine with respect to accrual and equitable modification of Title VII's limitation period); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (discussing accrual and equitable modification of ADEA's limitations period). Equitable relief from statutes of limitations, however, is rare. *Rotella*, 528 U.S. at 561 ("[t]he virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule"); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[f]ederal courts have extended equitable relief only sparingly"): *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984). Equitable tolling rules cannot be used by a plaintiff who knowingly fails to file within the limitations period. *See Irwin*, 498 U.S. at 458 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Baldwin County Welcome Center*, 466 U.S. at 152 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Amini*, 2001 WL 867422, at *5-*7 ("equitable tolling relief should be granted only sparingly," and plaintiff who could have filed earlier but did not was "far from diligent").

In *Baldwin County Welcome Center*, the plaintiff received a right-to-sue notice from the EEOC and mailed the notice to the district court along with a request for appointment of counsel.

466 U.S. at 148. The district court received the right-to-sue notice within 90 days after the plaintiff had received it from the EEOC. *Ibid.* The district court, nevertheless, dismissed the case because the right-to-sue notice did not meet the requirements for a complaint under Rule 8, including a factual statement to support the discrimination claim. *Id.* at 149. The court of appeals reversed, citing the remedial purposes of Title VII, and held that the filing of the right-to-sue notice tolled the running of the limitations period. This Court in turn reversed, agreeing with the district court that the right-to-sue notice did not constitute an adequate complaint. It also rejected the application of equitable tolling premised on the plaintiff's "diligent efforts." *Ibid.* The Court listed cases in which equitable tolling might be appropriate, including those in which the plaintiff received inadequate notice; there is a motion for appointment of counsel pending; the court led the plaintiff to believe that she had done everything required of her; or there was affirmative misconduct by the defendant that lulled the plaintiff into inaction. *Id.* at 151-52. The Court noted that none of those factors justifying application of equitable tolling was present, and rejected plaintiff's argument that the lack of prejudice to the defendant should be a factor justifying equitable tolling of Section 706(e)'s limitations period. *Id.* at 152. The Court stated (*ibid.*),

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 477 U.S. 807, 826 (1980), * * * "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Likewise, in *Irwin*, the Court rejected a plaintiff's attempt to rely on equitable tolling to extend the 30-day period in which he was required to file suit after receiving his right-to-sue letter from the EEOC. *Irwin*, 498 U.S. at 96. The plaintiff argued that

his attorney was absent from the office when his right-to-sue letter was delivered and that he had filed suit within 30 days of actually receiving the letter. The Court observed that equitable tolling is appropriate in cases where the plaintiff actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Ibid.* The Court characterized the delay in *Irwin*, by contrast, as "garden variety * * * excusable neglect" and found no extraordinary or exceptional circumstances warranting equitable tolling. *Ibid.*

The sparing use of equitable tolling doctrines to extend statutory limitations periods applies with full force to Title VII claims. This Court repeatedly has recognized that the Title VII limitations period facilitates the delicate balance among the interests of the employee in protecting his civil rights; the societal interest in promoting prompt filing of discrimination claims, thereby enhancing the likelihood of accurate determinations; and the employer's interest in being protected from untimely claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (limitations periods are "intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights."); *Ricks*, 449 U.S. at 259-60 ("it should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones'") (citation omitted); *Evans*, 454 U.S. at 559 (employer is "entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the limitations period); *Robbins & Myers*, 429 U.S. at 240 ("[a]dherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII").

Thus, this Court has expressly rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e). *Ricks*, 449 U.S. at 257-58; *Chardon*, 454 U.S. at 8; *Evans*, 431 U.S. at 558; *Robbins & Myers*, 429 U.S. at 239-40.[9]

In *Robbins & Myers*, this Court rejected an employee's argument that the Title VII limitations period was tolled during the pendency of a grievance procedure challenging her allegedly discriminatory and unfair termination. 429 U.S. 229. The employee filed a grievance pursuant to the applicable collective bargaining agreement two days after her termination challenging it as "unfair." However, she waited until after the grievance procedure was complete and after the Title VII limitations period had run to file her charge with the EEOC. *Id.* at 231-32. In arguing that Title VII's statutory limitations period should be tolled during the pendency of grievance/arbitration proceedings, the employee noted that any delay would be slight and that failure to permit such tolling might force an employee into court prematurely. This Court, citing *Alexander*, 415 U.S. 36, and *Johnson*, 421 U.S. 454, reaffirmed the independence of rem-

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[9] Likewise, this Court has rejected an equitable tolling rule when a plaintiff tried to rely on Title VII to extend the limitations period for his Section 1981 claim. In *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, the plaintiff filed a timely charge with the EEOC alleging race discrimination. More than three years later, the EEOC issued a right-to-sue letter. The plaintiff filed suit alleging violations of both Title VII and Section 1981. He argued that the one-year limitations period applicable to his Section 1981 claim was tolled during the pendency of the processing of his Title VII claim by the EEOC. This Court rejected the plaintiff's arguments and held that the one-year limitations period on his Section 1981 claim had expired. This Court held, "plaintiff has slept on his § 1981 rights. The facts that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. * * * We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466.

edies under a collective bargaining agreement and Title VII and held that "Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight.'" *Id.* at 240 (citation omitted).

This Court also has rejected attempts by plaintiffs who knowingly let the limitations period expire to use the continuing violation doctrine to salvage stale claims. As discussed above, the Court rejected the plaintiff's attempt to use the continuing violation doctrine to extend Title VII's limitations period in *Ricks*. 449 U.S. 252. The plaintiff argued that the continuing violation doctrine should apply to save his claim of discriminatory denial of tenure in part because a number of "unusual incidents" – including an alleged assault by the department chairman – occurred between the denial of tenure and his termination more than a year later. *Id.* at 257 n.8. This Court noted, "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57. Accordingly, this Court rejected the plaintiff's reliance on the continuing violation doctrine and held that his claim was time barred.[10] Of course, the Ninth Circuit would have reached the opposite result, deeming the assault and other unusual incidents capable of being interpreted as retaliatory and thus "sufficiently

[10] *See also Evans*, 431 U.S. 553 (rejecting plaintiff's reliance on continuing violation doctrine to save discriminatory seniority claim where the allegedly discriminatory policy had been discontinued earlier and plaintiff's claim was based on the current effects of the past policy); *cf. Chardon*, 454 U.S. at 7-8 (rejecting plaintiffs' reliance on termination date as date on which the limitations period began running where the plaintiffs had advance notice of their terminations).

related" to allow litigation over the denial of tenure. *See Fielder*, 218 F.3d at 986-87 (ostensibly unrelated verbal reprimand long after incidents of alleged harassment could be considered both retaliatory and related, and thus entire case, including otherwise time-barred harassment claims, must go to jury). But it is this Court's decisions that bind the Ninth Circuit, not the other way around.

In *Lorance*, the Court rejected plaintiffs' reliance on the continuing violation doctrine to extend Section 706(e)'s limitations period. 490 U.S. at 906. The *Lorance* plaintiffs failed to challenge the imposition of a discriminatory seniority system within 300 days. They did, however, file administrative charges within 300 days of being demoted pursuant to that seniority system. *Id.* at 903-04. The plaintiffs did not claim that they were unaware of the adoption of the discriminatory seniority system, but rather argued that under a continuing violation theory the discriminatory conduct occurred when they were demoted, not when the seniority system went into effect. *Id.* at 906. The Court rejected that argument, holding that plaintiffs' claims were wholly dependent on discriminatory conduct occurring outside the limitations period and that the demotions were merely inevitable consequences of the prior discriminatory conduct. *Id.* at 907-08.

Thus, in the Title VII context, the Court consistently has rejected the use of the continuing violation doctrine to extend the statutory limitations period when a plaintiff knowingly fails to pursue his claims in a timely fashion. Nothing, however, prevents the sparing use of the continuing violation doctrine, like other equitable tolling approaches, to protect those few Title VII plaintiffs who could not reasonably have been expected to bring an EEOC charge within 180 or 300 days of the first act or acts that in retrospect appear discriminatory. We turn now to an examination of the approaches that have been developed in the courts of appeals to see which is most consistent with this Court's precedents.

B. The Continuing Violation Doctrine Should Apply Only In Hostile Environment Cases Where The Plaintiff Reasonably Did Not Know The Conduct Was Discriminatory Or Where The Discriminatory Nature Of The Conduct Is Recognized As Discriminatory Only In Light Of Later Occurring Events

Early development of the continuing violation doctrine was aptly described as "inconsistent and confusing." *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 977 (5th Cir. 1980). That confusion continues today. The courts of appeals have interpreted the doctrine in widely divergent ways and apply different standards to interpret similar facts, resulting in contradictory outcomes. The widespread inconsistency and confusion has been recognized by both the courts and commentators. *See Galloway*, 78 F.3d at 1165 ("The question when conduct occurring outside the statute of limitations may, by virtue of its link with recent conduct, be made a basis for a legal claim is a vexing one * * *."); Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531 (2000) (describing the "increasingly complex and divergent application of the continuing violation doctrine in sexual harassment and other types of employment discrimination cases"); 2 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1351 (3d ed. 1996) (citing the continuing violation doctrine as "the most muddled area in all of employment discrimination law."); R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 AM. BUS. L.J. 365, 382-83 (1993) ("[b]ecause of the limited guidance from the U.S. Supreme Court, the federal circuits have adopted different standards for implementing the continuing violation doctrine"); T. Crivens, *The Continuing Violation Theory and Systematic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1172 (1988) (the

continuing violation doctrine is "one of the most confusing theories in employment discrimination law").

Three different approaches to the continuing violation doctrine have emerged. The Seventh Circuit's approach articulated by Judge Posner in *Galloway*, 78 F.3d 1164, limits the application of the continuing violation doctrine to cases in which "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway*, 78 F.3d at 1167. The First and Federal Circuits use the same approach. *See Sabree v. United Bhd. of Carpenters and Joiners, Local* 33, 921 F.2d 396 (1st Cir. 1990); *Bosley v. Merit Systems Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (Bryson, J.); *see also Fitzgerald v. Henderson*, 251 F.3d 345, 372 (2d Cir. 2001) (Korman, J., dissenting).

The Fifth Circuit's approach articulated in *Berry v. Board of Supervisors*, 715 F.2d 971 (1983), permits use of the continuing violation doctrine to save otherwise time-barred claims if the alleged acts are similar, if they are recurring, and if the untimely acts did not have the "degree of permanence which would trigger an employee's awareness of and duty to assert his rights." *Id.* at 981. The third factor, "permanence," is considered most important. *Ibid.* Therefore, if the early untimely act is sufficiently "permanent" in nature, a plaintiff may not rely on the continuing violation doctrine. The Fifth Circuit identified these three factors as relevant, not exhaustive. *Ibid.*

The third approach, advocated by the Ninth Circuit in this case and in *Fielder*, rejects both the *Galloway* and *Berry* analyses and permits use of the continuing violation doctrine to defeat a statute-of-limitations defense and recover damages for pre-limitations conduct so long as any act occurring outside the limitations period is "sufficiently related" to allegedly discrimina-

tory conduct occurring within the limitations period. Pet. App. 15a, 18a; *see also Fitzgerald*, 251 F.3d 345.[11] This approach ignores controlling precedent, effectively nullifies Section 706(e)'s limitations period, and undermines Title VII's remedial purpose of eradicating discrimination.

1. The "Notice" Limitation On The Continuing Violation Doctrine Is Consistent With The Notice Accrual Rule, Effectuates Title VII's Remedial Purpose Of Eradicating Discrimination, And Results In Predictable Outcomes

The *Galloway* approach to the continuing violation doctrine is consistent with both the notice accrual rule applicable to Title VII cases and Title VII's remedial purpose of eradicating discrimination. Moreover, the *Galloway* approach, which requires a focused inquiry into the facts of each case, results in predictable outcomes.

In *Galloway*, the Seventh Circuit recognized that equitable tolling doctrines including the continuing violation doctrine should be applied to save hostile environment claims from the Catch-22 of either filing prematurely or filing after the limitations period has run. The *Galloway* court stated that equitable tolling was appropriate in certain sexual harassment cases because "[i]n its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable, or may not cause sufficient distress to be worth making a federal case out of, or may not have gone on for long enough to charge the employer with knowledge and a negligent failure to take effective remedial

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[11] The 2-1 decision in *Fitzgerald*, which was rendered after the petition for a writ of certiorari in this case was filed, appears to put the Second Circuit on the same side of the widespread circuit split as the Ninth Circuit, though the majority opinion in *Fitzgerald* makes little effort to analyze its consistency with other circuits' jurisprudence.

measures." *Galloway*, 78 F.3d at 1166. To avoid encouraging premature or precipitate litigation, the Seventh Circuit held that conduct that is not the subject of an immediate complaint is not time barred provided "the victim of sexual harassment sues as soon as harassment becomes sufficiently palpable that a reasonable person would realize that she had a substantial claim under Title VII." *Ibid.* If a plaintiff does so "then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." *Ibid.*

The *Galloway* court, however, rejected the use of equitable doctrines in cases in which it was evident long before the plaintiff sued that she was a victim of actionable harassment. 78 F.3d at 1166. In such cases – as in *Bazemore* and the antitrust cases – the plaintiff is permitted to sue provided that the last act occurred within the limitations period, but she is not permitted to reach back and base her suit on or recover for damages incurred outside the limitations period. 78 F.3d at 1167. Thus, the court concluded that "a plaintiff may not base her * * * suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statue ran on that conduct." *Ibid.* In arriving at that conclusion, the Seventh Circuit reconciled the social interest in "encouraging the prompt filing of claims[,] and by doing so of enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities," with the equitable interest in protecting a plaintiff who files a Title VII charge as soon as he is or reasonably should be aware of an actionable injury. *Id.* at 1165, 1166.

In *Sabree*, the First Circuit applied a similar analysis, holding that the critical inquiry in determining whether a continuing violation tolled the limitations period is "what the plaintiff knew or should have known at the time of the discriminatory act." *Sabree*, 921 F.2d at 402. Consistent with the notice accrual rule applicable to Title VII cases, the *Sabree* court held,

> What matters is whether, when and to what extent the plaintiff was on inquiry notice. *A claim arising out of an injury which is "continuing" only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the [300] day limitation period.* It is this factor that is the undoing of Sabree, for he has admitted that he believed, at every turn, that he was being discriminated against. *A knowing plaintiff has an obligation to file promptly or lose his claim.* This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and thereby is able to perceive the overall discriminatory pattern. After all, [e]mployers as well as employees are entitled to procedural safeguards in the precincts patrolled by Title VII.

Ibid. (emphasis added; internal quotations and citations omitted).[12]

This notice limitation on the continuing violation doctrine is consistent with Title VII's notice accrual rule because it requires a knowing plaintiff to file his administrative charge promptly or lose his claim. It recognizes that the application of equitable principles, including the continuing violation doctrine, is appropriate when extraordinary or exceptional circumstances have prevented the plaintiff from recognizing that he is the victim of discrimination until some period of time has elapsed. Thus, the notice limitation on the continuing violation doctrine

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[12] The court "f[ou]nd the permanence factor [*i.e.*, the notice factor] dispositive of Sabree's case," and therefore "express[ed] no opinion as to the viability of * * * other factors" that other courts have taken into account. 921 F.2d at 402 n.12. Subsequent First Circuit cases have likewise pretermitted inquiry into any other factors when the plaintiff was on notice and did not file a charge within 300 days. *E.g.*, *Provencher v. CVS Pharmacy*, 145 F.3d 5, 15 (1st Cir. 1998). The First Circuit's approach, which is identical to the Seventh and Federal Circuits' approach, thus is pointedly *not* a balancing test.

is consistent with and a logical adjunct to this Court's rulings interpreting Section 706(e)'s limitations period.

Moreover, the notice limitation effectuates Title VII's primary policy of eradicating discrimination without compromising its secondary, "fallback" policy of compensating victims of discrimination. *Galloway*, 78 F.3d at 1167. Prompt filing of an administrative charge alleging discrimination "is almost certain to stop the [discrimination], so that unlike certain cases of nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can always seek injunctive relief against a continuation of the unlawful conduct." *Ibid.* Indeed, a plaintiff loses his claim and opportunity for compensation only when – like respondent Morgan – he fails to file within 300 days of the alleged violation. The notice limitation preserves the claims of employees who, in the exercise of due diligence, do not immediately appreciate the wrongful nature of the treatment they receive.

Statutes of limitations are designed to afford some predictability for both defendants and plaintiffs. The notice limitation on the continuing violation doctrine leads to predictable – yet not unduly harsh – results.

In cases involving hostile environment claims, courts applying the notice limitation routinely decide that the continuing violation doctrine cannot be used by plaintiffs who admit that they knew of the alleged discrimination before the limitations period.[13] *See Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 612 (1st Cir. 2000) (handwritten note by plaintiff identifying acts as discriminatory written more than a

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[13] Though critical of the case law placing weight on this factor, the author of Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, acknowledges that "courts have consistently rejected the continuing violation theory where plaintiffs have admitted to being aware of the sexual or discriminatory nature of the untimely acts." *Id.* at 553.

year before the charge filed precluded plaintiff from relying on the continuing violation doctrine); *Provencher,* 145 F.3d at 15 (plaintiff's admission that he knew he was being harassed long before he filed charge precluded invocation of the continuing violation doctrine); *Dasgupta v. Univ. of Wis. Bd. of Regents*, 121 F.2d 1138, 1140 (7th Cir. 1997) (allegations of outright discrimination in pay and promotion, coupled with the defendant's failure to protect employee from gross harassment, were sufficient to support a Title VII claim years before the employee filed suit, thereby precluding him from relying on the continuing violation doctrine); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663-64 (7th Cir. 1997) (plaintiff's admission that she knew of the nature of alleged sexual harassment at the time it occurred and complained about it long before the limitations period expired precluded her from relying on the continuing violation doctrine); *Garrison v. Burke*, 165 F.3d 565, 570 (7th Cir. 1999) (sexual assault would have put any reasonable person on notice that she had a substantial claim under the law and therefore she could not rely on the continuing violation doctrine to defeat the statute of limitations); *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1004 (7th Cir. 2000) (plaintiff who confronted supervisor with suspicion of pregnancy discrimination more than a year before filing an administrative charge could not rely on continuing violation doctrine).

By contrast, in cases in which the plaintiffs are able to identify the discriminatory conduct only in light of later events, the courts routinely decide that the continuing violation doctrine applies and the plaintiffs are permitted to reach back to otherwise time-barred conduct. *See, e.g., O'Rourke,* 235 F.3d at 732-33 (continuing violation doctrine applied where the complained-of conduct was discriminatory only because of sheer volume and repetition); *Wilson v. Chrysler Co.*, 172 F.3d 500, 510 (7th Cir. 1999) (continuing violation applied to save at least a portion of plaintiff's claim); *Galloway*, 78 F.3d at 1167 (continuing violation doctrine applied where the complained-of

verbal conduct was not of the kind that it would be reasonable to expect an employee to base a suit on the first time it occurred).

The *Berry* test for determining the application of the continuing violation doctrine recognizes the importance of notice to the plaintiff and thus is not inconsistent with Title VII's notice accrual rule. However, *Berry's* three-pronged test, augmented at times with unspecified additional factors, provides very little concrete guidance to courts or prospective litigants, particularly in cases in which the three factors point in different directions. Thus, application of the *Berry* test can lead to inconsistent results as the lower courts engage in fact-specific inquiries that "turn[] on the facts and context of each particular case." 715 F.2d at 981.

Moreover, both the first and second *Berry* factors – connectedness and frequency – are virtually foregone conclusions in hostile environment cases, in which a plaintiff has an actionable claim only when the complained-of conduct is severe and pervasive. *Meritor Sav. Bank*, 477 U.S. 57; *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993); *see Rush*, 113 F.3d at 483 ("failure to claim harassment in the 1991 EEOC charge does not destroy [plaintiff's] claim, because the evidence shows that the harassment intensified after the charge was filed, and moreover, she did not realize early on how pervasive or severe the harassment was"); *see also Huckabay*, 142 F.3d at 239 (tolling of statute of limitations was justified where "pattern of harassment was not the kind of violation that * * * would put a worker on notice that his rights had been violated"). Accordingly, in the context of hostile environment cases, *Berry*'s three factors can be distilled to the notice factor alone.

Under either *Galloway* or *Berry*, respondent's claims relating to events occurring before the limitations period would have been considered time barred because his admission that he was on notice of the allegedly discriminatory nature of petitioner's

conduct bars his reliance on the continuing violation doctrine. Only under the Ninth Circuit's "sufficiently related" test is respondent or any other plaintiff who knowingly sits on his or her rights able to invoke an equitable continuing violation doctrine to save time-barred claims.

2. The Ninth Circuit's "Sufficiently Related" Test Cannot Be Reconciled With The Court's Application Of The Notice Accrual Rule in Title VII Cases, Undermines Title VII's Remedial Purpose Of Eradicating Discrimination, and Yields Unpredictable Results

The Ninth Circuit's approach to the continuing violation doctrine articulated in *Fielder* and reaffirmed in this case rejects both *Galloway* and *Berry*. Pet. App. 15a. The lower court held that Ninth Circuit precedent "precludes * * * a notice limitation on the continuing violation doctrine." *Ibid.* The result is a formless, limitless test for applying a continuing violation exception that asks only if the otherwise time-barred acts are "sufficiently related" to any allegedly discriminatory act occurring within the limitations period.[14] Under the Ninth Circuit test, the continuing violation exception has swallowed the statute of limitations rule. Indeed, the Ninth Circuit compounded its error by applying its "sufficiently related" test to respondent's discrimination and retaliation claims, not just his hostile environment claim, and concluding that he could rely on the continuing violation doctrine with respect to each of those three claims. Pet. App. 18a-20a. As discussed above, that result contradicts this Court's holdings in *Evans*, *Ricks*, and *Lorance*, which require application of the notice accrual rule to all Title VII claims.

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[14] Furthermore, the Ninth Circuit requires juries, not judges, to apply the "sufficiently related" "test." *Fielder*, 218 F.3d at 986-87 ("If a jury finds that Bibler's reprimand was an act of retaliation, it becomes an issue of fact whether the retaliation was of the same kind alleged before the 300-day period."). The mind boggles at how juries in such cases are to be instructed.

The Ninth Circuit's "sufficiently related" test cannot be reconciled with this Court's rulings limiting use of equitable tolling rules, including the continuing violation doctrine, to unknowing plaintiffs. This Court's statute of limitations and equitable tolling cases have successfully reconciled the rights of defendants to be free of stale claims, the societal interest in promoting prompt adjudication of claims, and plaintiffs' interest in being able to pursue legal remedies. Using the continuing violation doctrine, the Ninth Circuit puts its thumb on the scale and tips it in favor of allowing plaintiffs to combine timely and untimely claims with little regard to the existence of the limitations period. Indeed, the lower court would permit a plaintiff who knew that his rights were being violated to sit on his rights indefinitely, allowing damages to pile up rather than seeking to rectify the situation. *But see Klehr*, 521 U.S. at 187 (criticizing a rule that "would permit plaintiffs who know of the defendant's pattern of activity simply to wait 'sleeping on their rights,' as the pattern continues and * * * damages accumulate").

In both this case and *Fielder*, the employees admitted to believing that they were being discriminated against years before they filed administrative charges. Pet. App. 28a; *Fielder*, 218 F.3d at 979. As Judge Kleinfeld noted in his dissent in *Fielder*, "[t]he practical consequence of the majority opinion is to keep alive incidents of claimed [discrimination] permanently, with no statute of limitations at all." 218 F.3d at 990; *see also Anderson*, 190 F.3d at 936-37 (permitting recovery for more than 11 years of allegedly discriminatory conduct without reference to whether plaintiff knew or should have known of conduct at some prior time); *Draper*, 147 F.3d at 1108-10 (permitting plaintiff to rely on continuing violation doctrine even though she complained to management about allegedly discriminatory conduct more than a year before filing an administrative charge).

Not only is the "sufficiently related" test at odds with controlling precedent, but the Ninth Circuit's continuing violation

rule is so indeterminate that it cannot be applied in a consistent manner. Under the lower court's approach, the district courts – and juries – are vested with unlimited discretion to determine in individual cases which acts are "sufficiently related" with respect to their subject matter and temporal proximity. The threshold of relatedness is low. In this case, the lower court permitted respondent to revive time-barred claims of harassment including an alleged assault, allegedly unfair discipline, denial of training, and a prior termination by pointing to three discrete events including cancellation of training, a suspension, and a suspension leading to termination. Pet. App. 18a-20a. In *Fielder*, the plaintiff was permitted to revive time-barred claims of sexual harassment involving a coworker by pointing to two discrete instances of alleged retaliation by her supervisor. 218 F.3d at 987-88. In light of these results, it is difficult to imagine two separate acts of discrimination that the court of appeals would not allow a jury to find to be "sufficiently related" for purposes of applying the continuing violation doctrine.

Finally, the Ninth Circuit's approach undermines Title VII's primary remedial purpose of eradicating discrimination. Instead of encouraging prompt filing of claims with the benefit of eradicating discrimination, the Ninth Circuit's approach encourages putative victims to endure discriminatory treatment for as long as possible in order to maximize their potential damages.[15] Not only is that result unfair to employers,

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[15] This result is antithetical to the avoidable consequences doctrine that Title VII borrows from tort law. *Ellerth*, 524 U.S. at 764 (citing *Ford Motor Co.*, 458 U.S. at 232 n.15). Under that doctrine, "'[w]here one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.'" *Ford Motor Co.*, 458 U.S. at 232 n.15 (quoting C. MCCORMICK, LAW OF DAMAGES 127 (1935)); *see also Faragher*, 524 U.S. at 807; *Gebser v. Lago Vista Sch. Dist.*, 524 U.S. 274, 307 (1998) (Ginsburg, J., dissenting)

but it dilutes any positive societal benefit flowing from Title VII.

In the final analysis, there is nothing to be said for the Ninth Circuit's rule – and the Ninth Circuit has made no serious attempt to justify it, other than to cite its own precedents and belittle the approaches of other circuits – except that it allows plaintiffs to win more often and thus lets employers "get away with" fewer violations of Title VII. But, of course, that could be said about any excuse for ignoring the statute of limitations. Furthermore, employees like Morgan have the means to avoid *any* ill consequences of the statute of limitations just by filing EEOC charges within 300 days of what they believe to be acts of discrimination. For those who do not have that ability because a charge would be dismissed as premature, the *Galloway/Sabree* rule provides the needed protection. The "continuing violation doctrine" has a legitimate role to play in protecting such employees, but not in protecting Abner Morgan or the others whom the Ninth Circuit would relieve of the avoidable consequences of their own decisions not to pursue Title VII remedies.

("to the extent that a plaintiff unreasonably fail[s] to avail herself of * * * preventative and remedial measures, and consequently suffer[s] avoidable harm, she would not qualify for Title IX relief") (citing MCCORMICK, *supra*, at 127-159).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION
Petitioner,

v.

ABNER J. MORGAN, JR.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Where unlawful discrimination allegedly occurs within the 180/300 day charge filing period, may an employer also be held liable for discrimination occurring prior to the charge filing period if the earlier discrimination was sufficiently like or related to the discrimination occurring with the period that the employer was on notice of the need to investigate those earlier events?

Where a hostile work environment is claimed to exist within the 180/300 day charge filing period, must the trier of fact consider acts of harassment and/or other discrimination occurring outside of the charge filing period which may have helped create the hostile environment in order to determine the employer's liability?

In a discrimination case, is the trier of fact permitted to consider evidence of the employer's conduct or acts of harassment occurring prior to the 180/300 day charge filing period in order to determine the employer's motive and intent, or the existence of a hostile work environment with the charge filing period?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

I. TITLE VII REQUIRES COURTS TO PROVIDE REDRESS FOR DISCRIMINATION THAT OCCURRED PRIOR TO THE CHARGE FILING PERIOD IF IT IS PART OF A CONTINUING VIOLATION THAT CONTINUED INTO THE CHARGE-FILING PERIOD 11

A. THE 180/300 DAY CHARGE FILING PERIOD IS AN EXHAUSTION RULE NOT A LIMITATION ON THE SCOPE OF THE EMPLOYER'S LIABILITY 15

B. THE EXISTENCE OF THE TWO YEAR BACK PAY RULE IN SECTION 706(g) DEMONSTRATES THAT THE CHARGE FILING PERIOD DOES NOT LIMIT THE SCOPE OF LIABILITY 17

PERIOD DOES NOT LIMIT THE SCOPE OF LIABILITY 17

1. THE TEXT OF SECTION 706(g)(1) COMPELS THIS INTERPRETATION OF TITLE VII 17

2. THE PRIOR DECISIONS OF THIS COURT TREAT THE TWO YEAR RULE, NOT THE 180/300 DAY CHARGE FILING PERIOD, AS THE LIMIT ON BACK PAY 20

3. BASING THE AMOUNT OF BACK PAY ON THE LENGTH OF THE CHARGE FILING PERIOD WOULD HAVE PECULIAR AND INCONSISTENT CONSEQUENCES 21

4. NEITHER THE 180/300 DAY CHARGE FILING PERIOD NOR THE TWO YEAR BACK PAY RULE LIMIT THE PERIOD FOR WHICH COMPENSATORY AND/OR PUNITIVE DAMAGES CAN BE AWARDED 24

C. THE CONTINUING VIOLATION DOCTRINE IS CONSISTENT WITH THE STATUTORY LANGUAGE IN SECTION 706(e)(1) 25

D. THE CONTINUING VIOLATION DOCTRINE IS EMBODIED IN AN EEOC REGULATION

AND MANAGEMENT DIRECTIVE ENTITLED TO *CHEVRON* DEFERENCE.....26

E. THE INTERPRETATION OF OTHER STATUTES DOES NOT PRECLUDE RECOGNITION OF THE CONTINUING VIOLATION DOCTRINE UNDER TITLE VII 32

F. WHERE THE DISCRIMINATION PRIOR TO THE CHARGE FILING PERIOD IS SUFFICIENTLY LIKE OR RELATED TO THE DISCRIMINATION OCCURRING WITHIN THE CHARGE FILING PERIOD THAT THE EMPLOYER IS ON NOTICE OF THE NEED TO INVESTIGATE THOSE EARLIER EVENTS PLAINTIFFS SHOULD BE ALLOWED TO ESTABLISHLIABILITY FOR THE EARLIER ACTS..... 36

II. IN DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT EXISTED WITHIN THE CHARGE FILING PERIOD, THE TRIER OF FACT MUST CONSIDER EARLIER ACTS OF HARASSMENT OR OTHER TYPES OF DISCRIMINATION WHICH MAY HAVE CREATED THE HOSTILE ENVIRONMENT..... 39

III. WHETHER MORGAN BELIEVED PRIOR TO 1995 THAT HE WAS THE VICTIM OF UNLAWFUL DISCRIMINATION IS IRRELEVANT 43

IV. MORGAN IS ENTITLED TO A NEW TRIAL TO DETERMINE AMTRAK'S LIABILITY WITHINTHE CHARGE FILING PERIOD 45

A. The District Court Erred in Limiting Evidence of The Hostile Work Environment from Outside the 300-Day Charge Filing Period 45

B. The District Court Erred in Limiting Evidence of Intentional Discrimination from Outside the 300-Day Charge Filing Period 46

V. THIS CASE SHOULD BE REMANDED TO THE NINTH CIRCUIT TO ALLOW IT TO REVIEW THE DISTRICT COURT'S LIMITATION AND EXCLUSION OF EVIDENCE OF DISCRIMINATION AND HARASSMENT 48

CONCLUSION..... 50

RESPONDENT'S SUPPLEMENTAL APPENDIX 1sa

TABLE OF AUTHORITIES

Cases

Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) 14

Agency Holding Corp. v. Malley -Duff & Associate, Inc.,483 U.S. 143 (1987) 32

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 18, 20

Allen v. County of Montgomery, 788 F.2d 1485 (11th Cir. 1986) 48

Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999) 37

Ashley v. Boyle's Famous Corned Beef Co., Inc. 66 F.3d 164 (8th Cir. 1995) 27

Batesole v. Stratford, 505 F.2d 804 (6th Cir. 1974) 5

Beall v. Abbott Laboratories, 130 F.3d 614 (4th Cir. 1997) 36

Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983) 43

Bonner v. Guccione, 178 F.3d 581 (2d Cir. 1999) 36

Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998) 40, 41, 45

Burzynski v. Cohen, No. 99-4298, 2001 U.S. App. LEXIS 18997 (6th Cir. Aug. 23, 2001) 36

Cannon v. University of Chi., 441 U.S. 677 (1979) 24

Chardon v. Fernandez, 454 U.S. 6 (1981) 14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9, 32

City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 20

Clark County School District v. Breeden,__ U.S. __, 121 S. Ct. 1508 (2001) 46

Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980) 12

Commonwealth of Pa. v. Porter, 659 F.2d 306 (3d. Cir. 1981) 47

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 477 U.S. 102 (1980) 25

Cornwell v. Robinson, 23 F.3d 694 (2d Cir. 1994) 36

Courtney v. La Salle University, 124 F.3d 499 (3d Cir. 1997) 36

Cox v. U.S. Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968) 27

Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 750 N.E.2d 928 (2001) 43

Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1968) 27

Delaware State College v. Ricks, 449 U.S. 250 (1980); 14

Douglass v. Eaton Corp., 956 F.2d 1339 (6th Cir. 1992) 49

EEOC v. Dinuba Med. Clinic, 222 F.3d 580 (9th Cir. 2000) 27

EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994) 49

EEOC v. Gen. Elec. Co., 532 F.2d 359 (4th Cir. 1976) 38

EEOC v. Home Ins. Co., 553 F. Supp. 704 (S.D.N.Y. 1982) 37

EEOC v. Keco Indus., 748 F.2d 1097 (6th Cir. 1984) 37

EEOC v. Mitsubishi Motor Mfg. of Am., 990 F. Supp. 1059 (C.D. Ill. 1998) 37

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) 15, 16

EEOC v. W. Publishing Co., 502 F.2d 599 (8th Cir. 1974) 38

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1998) 48, 49

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ..... *passim*

Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2001) 36

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 20

Galloway v. General Motors Service Parts Operations, 78 F.3d 1164 (7th Cir. 1996) 27, 43

Gardner v. Morris, 72 F.2d 1271 (8th Cir. 1985) 36

Glass v. IDS Fin. Servs., Inc., 778 F. Supp. 1029 (D. Minn. 1991) 37

Glass v. Phila. Elec. Corp., 34 F.3d 188 (3d Cir. 1994) 49

Gross v. United States, 676 F.2d 295 (8th Cir. 1982) 36

Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992) 36

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 40, 41, 45

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 7, 11, 12, 34, 38

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995) 49

Hicks v. ABT Associates, Inc., 572 F.2d 960 (3rd Cir. 1978) 38

Hull v. Cuyahoga Valley Board Of Education, 926 F.2d 505 (6th Cir. 1991) 36

Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) 49

Hurley v. Atlantic City Police Department, 174 F.3d 95 (3d Cir. 1999) 49

International Union of Electrical Radio & MachinWorkers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 14

Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164 (7th Cir. 1976) 38

Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) 36

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 25

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 32, 33, 34

Lang v. Tex. & Pacific Railway Co., 624 F.2d 1275 (5th Cir. 1980) 5

Lee v. Air Products and Chemical, Inc., 36 F.3d 1093 (4th Cir. 1994) 27

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 14

Love v. Pullman Co., 404 U.S. 522 (1972) 16, 44

Macklin v. Spector Freight System Inc., 478 F.2d 979 (D.C. Cir. 1973) 38

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10, 46

Melville Confections, Inc v. NLRB, 327 F.2d 689 (7th Cir. 1964) 34

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 41, 46

Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (citations omitted) 26

Morgan v. National R.R. Passenger Corp., 232 F.3d 1008 (9th Cir. 2000) 6, 45

Mullen v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130 (4th Cir. 1988) 49

NLRB v. Pennwoven, Inc., 194 F.2d 521 (3d Cir.1952) 35

National R.R. Passenger Corp. v. Morgan, __ U.S. ___, 121 S. Ct. 2547 (2001) 6

O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) 39

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) 16, 18

Ong v. Cleland, 642 F.2d 316 (9th Cir. 1981) 38

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 47

Perrin v. United States, 444 U.S. 37 (1979) 25

Phillips v. Smalley Maint. Servs., Inc., 711 F.2d 1524 (11th Cir. 1983) 49

Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 120 S. Ct. 2097 (2000) 47

Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) 48

Roberts v. N. America Rockwell Corp., 650 F.2d 823 (6th Cir. 1981) 36

Rotella v. Wood, 528 U.S. 549 (2000) 33

Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997) 36

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 38

Scott v. St. Paul Postal Service, 720 F.2d 524 (8th Cir. 1983) 36

Sendall v. Boeing Helicopters, 22 F.3d 303 (3d Cir. 1994) 27

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 27, 28

Taylor v. Home Insurance Co., 777 F.2d 849 (4th Cir. 1985) 36

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 13

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 47

United States v. Mead Corp., _U.S._, 21 S. Ct. 2164 (2001) 32

Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982) 37

Varner v. National Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996) 36

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 24

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 39

West v. Gibson, 527 U.S. 212 (1999) 15, 31

West v. Phila. Electrical Co., 45 F.3d 744 (3d Cir. 1995) 36, 39

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 33

Zipes v. Trans World Airlines Inc., 455 U.S. 385 (1982) 10, 16, 45

Statutes

2 U.S.C. § 1202 22

2 U.S.C. § 1220(a) 22

2 U.S.C. § 1220(b)(1) 22

2 U.S.C. § 1311(a)(1) 23

2 U.S.C. § 1311(b)(1)(A) 23

2 U.S.C. § 1402 23

2 U.S.C. § 1403 23

2 U.S.C. § 1404 23

15 U.S.C. § 15b 9, 33

29 U.S.C. § 791 23
29 U.S.C. § 794a 23
42 U.S.C. § 2000e-2(h) 26
42 U.S.C. § 2000e-2(i) 26
42 U.S.C. § 2000e-2(k) 26
42 U.S.C. § 2000e-5(e)(1) 7, 17, 21, 25
42 U.S.C. § 2000e-5(g) 13, 26
42 U.S.C. § 2000e-5(g)(1) 17
42 U.S.C. § 2000e-6 35
42 U.S.C. § 2000e-6(a) 26
42 U.S.C.§ 2000e-16 21
42 U.S.C. § 2000e-16(b) 21
42 U.S.C. § 2000e-16(d) 28
Fed. R. Evid. 401 47
Fed. R. Evid. 403 47
Fed. R. Evid. 404(b) 47

Regulations

29 C.F.R. § 1614.105(d) 22

29 C.F.R. § 1614.106 22
29 C.F.R. § 1614.204(l)(3) 29
29 C.F.R. § 1614.501(a)(1) 22
29 C.F.R. § 1614.501(a)(4) 28
29 C.F.R. § 1614.501(c)(1) 28

Miscellaneous

Black's Law Dictionary (6th ed. 1990) 26
Management Directive 110, *at* http://www.eeoc.gov/federal/md110.html 30
1 EEOC Compliance Manual § 22.6(a) [BNA] (2001) 27
EEOC New Compliance Manual § 2 28
Webster's Ninth New Collegiate Dictionary (1991) 26
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STATUTES AND REGULATIONS INVOLVED

The full text of the following statutes can be found in Respondent's Supplemental Appendix.

15 U.S.C. § 15b.

42 U.S.C. § 2000e-5(e)(1).

42 U.S.C. § 2000e-5(g)(1).

42 U.S.C. § 2000e-16(b) - (d).

29 C.F.R. § 1614.501(a)(4).

29 C.F.R. § 1614.501(b)(3).

29 C.F.R. § 1614.501(c)(1).

STATEMENT OF THE CASE

Abner Morgan worked for Amtrak from August 1990 until March 1995. Amended Declaration of Abner Morgan ("Morgan Decl."), Civil Docket ("CD") No. 106 at 2, 6, 7.[1] In August 1990, Amtrak was taking over the Oakland Yard from Southern Pacific Railroad. Declaration ("Decl.") of Joe George, CD No. 98 at 1-2. Most of Morgan's co_workers were or had been Southern Pacific Railroad employees, including most of his managers. *Id.*

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[1] Whenever a declaration or deposition is referenced, it refers to a Declaration or deposition filed in the District Court in Opposition to Amtrak's Motion for Summary Judgment. The initial numbers refer to the Civil Docket. Page numbers are to the actual pages in the document.

On February 25, 1991, Morgan was asked to come to a meeting with his supervisor, Jerry Denton, and the facilities manager, Robert Vandenburg. Morgan Decl., CD No. 106 at 2. When Morgan refused to attend the meeting without union representation, he was terminated for insubordination in violation of Rule L. *Id*.. After filing a union grievance, Morgan was reinstated and the termination was reduced to a 10-day suspension. *Id* at 2-3. This was the harshest discipline imposed on any employee at the Yard for a Rule L violation during the period between 1989 and 1992. Trial Tr. at 1651-52.

During his tenure at Amtrak, Morgan was subjected to a barrage of disciplinary charges, even though white employees were rarely, if ever, disciplined for comparable behavior. CD No.93, Deposition ("Dep.") of Gary A. Biemborn at 147-50; CD No. 93, Dep. of Elwood Conley at 20-24, 28-29; CD No. 93, Dep. of Glenn O. Fisher at 44-46, 50-53; CD No. 93, Dep. of Greg Hourigan at 56-59; Decl. of Robert Ramirez, CD No. 100 at 1-3. Racial epithets and disparate treatment of African American employees were common, particularly of Morgan. Decl. of Michael Williams, CD No. 91 at 2; Decl. of Meriola Gotthardt, CD No. 99 at 2; Decl. of Arthur Elwood Conley, CD No. 92 at 2; Decl. of Joe George, CD No. 98 at 2; CD No. 93, Conley Dep. at 20-24, 28-29.

Morgan was repeatedly denied access to training and training opportunities. Morgan Decl, CD No. 106 at 3-5. When he asked about receiving further training, he was told he "stood a snowball's chance in hell of becoming an electrician in the Oakland Yard." *Id*, at 3. He was also assigned demeaning tasks outside of his craft that no white electrician was ever assigned. *Id*.; Ramirez Decl., CD No. 100 at 1-2.

During Morgan's tenure, the Yard was managed by a small group of managers. Vandenburg, the top official at the Yard, was heard to state that he didn't want too many blacks as supervisors because of "too many problems." CD No. 93, Conley Dep. at 23-24. His second-in command, Ray Borge, was referred to by an African-American manager as "the Mark Fuhrman of Oakland." CD No. 93, Dep. of Raymond P. Borge at 136-37. Borge had a habit of calling African-Americans "shuffle-butt ni–ers" and even performed 'the shuffle-butt ni–er" dance for his co-supervisors, including Vandenburg. CD No. 93, Conley Dep. at 21, 28-29. Other managers, including Robert Bordenave, Joe Deely and Jerry Denton were overheard using the "N" word at various times. Williams Decl., CD No. 99 at 2; CD No. 93, Conley Dep. at 21, 28-29; Gotthardt Decl., CD No. 99 at 2.

Morgan repeatedly sought solace from Amtrak's EEO office by complaining about the discrimination, retaliation and harassment he experienced at Amtrak's Oakland Yard. Morgan Decl., CD No. 106 at 5, 7. This only exacerbated the poor treatment he received. Despite his numerous letters to Amtrak's EEO office, little, if anything, was ever done to change the behavior of these supervisors. Early on, they began a concerted campaign to fire him.

In July 1993, Vandenburg tried to coerce Ken Phillips (Morgan's coworker) into changing a statement regarding an interaction involving Morgan and a union official at the Yard to reflect negatively on Morgan. CD No. 93 Dep. of Kenneth Phillips at 60; Trial Tr. at 1043, 1052-1057. Vandenburg told Mr. Phillips that he could make Mr. Phillips' life better for him if Mr. Phillips would change his statement, and that "they were going to fire [Morgan] anyways [sic]."

Trial Tr. at 1055. Mr. Phillips refused and was thereafter subjected to retaliation himself. Trial Tr. at 1054-55.

This campaign of harassment and retaliation culminated in Morgan's termination in 1995 for allegedly "threatening" one of his supervisors. Thereafter, on February 27, 1995, Morgan filed a broad charge with the EEOC alleging a *continuing* course of discriminatory conduct and retaliation against him and other Black employees. Morgan Decl., CD No. 106.

In a pretrial order, the district court dismissed Morgan's claims outside the 300 day charge filing period and a number of claims within the relevant time period on summary judgment. Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, CD No. 119. The district court's summary judgment order limited the trial to three discrete incidents within the charge filing period. *Id.*

The district court further excluded relevant evidence in the Final Pretrial Order. It allowed Morgan to present evidence of his work history at Amtrak outside the charge filing period, but limited such evidence to "background" or "context." Final Pretrial Scheduling Order, CD No. 176. During the trial, the district court repeatedly issued limiting instructions, informing the jury that the evidence outside the 300 day period was only for "background." The first limiting instruction came during the voir dire, and continued to be made virtually every time any facts from outside the charge filing period were presented. Trial Tr. at 23-24, 187-88, 310-14, 320-21, 431-33 The district court also issued these

same limiting instructions as final instructions to the jury.[2] Trial Tr. at 2729-31.

The district court further determined that evidence of discrimination or retaliation against people besides Morgan would be determined on a case-by-case basis. Trial Tr. at 86-93. A number of witnesses were not permitted to testify to the discrimination they had witnessed against other African Americans by Morgan's supervisors. For example, testimony by one of Morgan's coworkers regarding the disparate disciplinary actions levied by Amtrak supervisors against African-Americans was excluded by the trial court because it found the evidence to be "beyond the scope of this case." Trial Tr. at 922-26.

The district court also severely limited the presentation of the hostile work environment evidence. Order re Hostile Environment Claim ("HWE Order"), CD No. 194. It ruled that although a hostile work environment claim remained after the summary judgment order, the only evidence the jury could consider was evidence from within the 300 day charge filing period. *Id.*

During its deliberations, the jury repeatedly submitted questions to the court seeking clarification regarding the evidence presented and the instructions given about the evidence. Trial Tr. at 2847-49, 2851-59. The questions indicate that the jury was totally confused about what weight

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[2] The fact that Morgan's counsel did not object directly to these final instructions is of no consequence because there were repeated objections made to these instructions throughout the trial. *See Lang v. Tex. & Pac. Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980); *Batesole v. Stratford*, 505 F.2d 804, 808 (6th Cir. 1974).

to place on evidence from both inside and outside the charge filing period. First, the jury asked two questions, the first of which was, "Why was the time, May '94 through February '95, chosen for deliberations? The bulk of the evidence has been previous." Trial Tr. at 2847. In response, the district court invoked the 300 day charge filing period as the limitations period for both liability and evidence. Trial Tr. at 2847-48.

After receiving the district court's initial response, the jury deliberated further, but still unclear on the issues surrounding the relevant time frame, asked another series of questions. Trial Tr. at 2851. The first question was: "Do plaintiff's complaints about discrimination have to have occurred during the time period from May'94 to February '95?" *Id.* The district court, after further oral argument about what answer to give, responded esssentially not, but again limited their consideration of the evidence to the 300 day charge filing period. Trial Tr. at 2858.

The jury, after receiving the answers to its questions, found against Morgan. The verdict was delivered, however, along with a note entitled "Jury Comments on Verdict" which contained five (5) paragraphs. (Jury Comments on Verdict, CD at 240. Paragraph Four of the note commented on the retaliation claim; Paragraph 5 commented on the hostile environment claim.

On appeal, the Ninth Circuit reversed the district court's interpretation of the continuing violation doctrine, but did not reach the evidentiary issues. *Morgan*, 232 F.3d at 1017-18. This Court granted review solely on the applicability and interpretation of the continuing violation doctrine. *Nat'l R.R.*

Passenger Corp. v. Morgan, ___ U.S. ___; 121 S. Ct. 2547 (2001).

SUMMARY OF ARGUMENT

This case presents three distinct issues: (1) whether and under what circumstances an employer who engages in a continuing pattern of discrimination which continues into the charge filing period is immune for liability for acts occurring prior to the charge filing period; (2) whether harassment occurring prior to the charge filing period may be relied on by a plaintiff to demonstrate the existence of a hostile environment *during* the charge filing period; and (3) whether proof of intentional discrimination, including retaliation and/or an actionable hostile environment during a charge filing period can be based in part on evidence of discriminatory conduct which occurred *prior* to the charge filing period.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a unanimous Court recognized that ongoing violations of federal anti-discrimination laws must be treated differently from discrete, isolated unlawful acts. The Court recognized that where the plaintiff alleges a continuing violation, concerns regarding staleness or prejudice to the defendant are absent or diminished. Simply put, an employer that maintains a continuing violation neither deserves nor obtains the repose afforded by the statute of limitations. Furthermore, the "trigger" for the statute of limitations must be the last occurrence of the unlawful practice.

The 180/300 day charge filing period in Section 706(e)(1) does not limit the scope of recovery in an otherwise timely Title VII action. 42 U.S.C. § 2000e-5(e)(1). The charge fil-

ing requirement is only a part of the administrative exhaustion process. Congress' concern in enacting the procedural steps to secure enforcement of Title VII was to ensure prompt notification to the employer. Although § 706(e)(1) addresses the time limits for filing a charge with the EEOC, it does not purport to delineate the scope of the relief that a court might subsequently provide, or the temporal or substantive range of violations which a court might ultimately address. Where an ongoing violation begins before and continues into the charge filing period, a charge filed within 180/300 days of the last occurrence constitutes adequate exhaustion for the entire violation.

Section 706(g)(1) of Title VII, which allows back pay awards up to two years decisively demonstrates that the charge filing period does not limit the period for which relief can be obtained. This two year back pay rule would be meaningless if the employer's liability was to be determined solely by reference to the shorter 180/300 day period established by § 706(e)(1). Basing the amount of back pay on the length of the charge filing period would have peculiar and inconsistent consequences in the variety of situations where Congress has mandated relief pursuant to the remedial provisions of Title VII.

The explicit language in Title VII referring to an "unlawful employment practice" provides a statutory basis for the continuing violation doctrine. Section 706(e)(1) requires that a charge be filed within a specified number of days of the unlawful "practice." Unlike a discrete act of discrimination, like a dismissal, a practice can endure or recur over a period of time. Petitioner's contention that § 706(e)(1) must always be construed to require the filing of a charge within

180/300 days of each "discrete act" without regard to continuing violations is inconsistent with the wording, purpose and intent of the statute.

The EEOC, having assumed the role once played by the Civil Service Commission regarding administrative complaints of discrimination by federal employee, has followed and applied the continuing violation doctrine for at least thirty (30) years. The EEOC's federal sector regulation, 29 C.F.R. § 1614.105(c)(1), as well as Management Directive 110, which both codify the doctrine, are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Past interpretations of other statutes are of little value in construing Title VII's particular language. The Clayton Act, for example, provides that "[a]ny action . . . shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15(b). Title VII contains no such express accrual rule. Similarly, the types of recurring violations that occur under Title VII are virtually unknown in NLRA cases and its provisions are materially different with respect to the exhaustion requirements, limiting its precedential value.

The proper formulation of the continuing violation doctrine derives from the text of Title VII itself and from the purposes of a statute of limitations. Thus, discrimination occurring prior to the charge filing period may be redressed where that earlier discrimination is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period

events. This formulation strikes an appropriate balance between the broad remedial purpose of Title VII and the notice purpose of the filing requirement. *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 398 (1982).

Imposing a notice requirement on Title VII would focus exclusively on the desire to encourage prompt filing of claims and conflict with harassment victims' entitlement to the maximum benefit of the law. A desire to encourage prompt filing of claims cannot undermine the broad remedial purpose of the anti-discrimination law and destroy the balance created by this Court in *Zipes*.

There is a natural affinity between hostile environment claims and continuing violations. In a hostile environment case, it is the environment itself that constitutes the violation, not the individual acts of harassment which cause that environment. Pre-charge filing period harassment normally contributes to establishing an unlawful hostile environment and must be considered by the trier of fact in every circumstance. The district court erred in holding that a plaintiff, in attempting to show the existence of a hostile environment within 300 days of his charge, could not rely on earlier acts of harassment. This error alone mandates affirmance of the Ninth Circuit's decision reversing the judgment in favor of Amtrak.

The district court also erred in forbidding the plaintiff to present evidence of, or even to assert during trial that intentional discrimination had occurred more than 300 days prior to his Title VII charge. This Court has repeatedly held that intentional discrimination prior to the charge filing period may be utilized to prove an employer's motive during that period. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This error also mandates affirmance of the

Ninth Circuit's decision reversing the judgment in favor of Amtrak.

I. TITLE VII REQUIRES COURTS TO PROVIDE REDRESS FOR DISCRIMINATION THAT OCCURRED PRIOR TO THE CHARGE FILING PERIOD IF IT IS PART OF A CONTINUING VIOLATION THAT CONTINUED INTO THE CHARGE-FILING PERIOD

Nineteen years ago, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) recognized that ongoing violations of federal anti-discrimination laws must be treated differently from discrete, isolated unlawful acts. *Havens Realty* involved an interpretation of § 812(a) of the Fair Housing Act, which requires that certain actions under that statute be commenced within 180 days of the unlawful practice. The Court rejected the defendant's contention that each instance of an ongoing violation triggered a separate 180 day limitation period.

A unanimous Court held that a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. *Id.* at 380. In *Havens Realty*, the Fourth Circuit had permitted recovery for discrimination occurring outside the limitations period by allowing plaintiffs Coleman and Willis to pursue all of their claims because a single incident fell within the limitations period. Based upon the single incident within the limitations period, the Court held that none of the claims were barred. *Id.*

It is conceded that each of the specific acts of the defendants except the one of July 13 transpired more than 180 days before the complaint was filed. . . . The plaintiffs

contend that the "occurrence" is the defendants' continuing practice of racial steering and that the 180 days commences with the last act--in this case the violation of July 13. We agree with the plaintiffs and hold that none of the allegations in the complaint are time-barred by the 180-day provision.

Coles v. Havens Realty Corp., 633 F.2d 384, 391-92 (4th Cir. 1980).

This Court agreed with the Fourth Circuit: [F]or purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). ***Where the challenged violation is a continuing one, the staleness concern disappears.*** Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968). *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 398.

Havens Realty, 455 U.S. at 380 (emphasis added). Notably, the *Havens Realty* Court cited *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385 (1982), a Title VII case, where it struck a balance between the remedial purpose of the legislation and the notice purpose of the filing requirement. The Court further held:

> Applying this principle to the "neighborhood" claims of Coleman and Willis, we agree with the Court of Appeals that the 180-day statute of limitations is no bar. . . . Plainly the claims, as currently alleged, are based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents--including at least one (involving Coles) that is asserted to have occurred within the 180-day period. *Havens Realty*, 455 U.S. at 381. Thus, the Court permitted recovery for discrimination occurring prior to the 180-day period because it was part of a continuing violation that extended into the period of limitations, and the action was filed within 180 days of the *last occurrence*. *Id.* at 380.[3]

The decision in *Zipes* was issued on the same day as *Havens Realty* on February 24, 1982.[4] In *Zipes*, the District Court presumed that the violation continued until the airline changed its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue flying, and granted the plaintiff class' motion for summary judgment. The Court of Appeals affirmed the summary judgment on liability, but denied relief to

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[3]In his dissenting opinion in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), Justice Marshall pointed out that: "Title VII recognizes that certain violations, once commenced, are continuing in nature. In these instances, discriminatees can file charges at any time ***up to 180 days after the violation ceases.*** (They can, however, receive back pay only for the two years preceding the filing of charges with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V).)" *Id.* at 561 (Marshall, J., dissenting) (emphasis added).

[4]*Havens Realty* was heard on December 1, 1981; *Zipes* was heard on December 2, 1981.

most of the class members because they had never filed Title VII charges. A unanimous Supreme Court reversed and agreed that timely filing by each class member is not a prerequisite to class-wide relief in a Title VII lawsuit. 455 U.S. at 393.

Prior decisions of this Court on which Petitioner relies did not involve allegations of continuing violations, or of illegal acts subsequent to the adverse employment decision which constituted the basis of the claim. *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Int'l Union of Elec. Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 231-232 (1976).

In *Ricks*, 449 U.S. at 257, the Court specifically held that "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." Quoting the Ninth Circuit,[5] the Court held thatthe proper focus is on the time of the discriminatory act. *Id.* That admonition was repeated by the Court a year later in *Chardon v.* Fernandez, 454 U.S. at 8, and then again, eight years later in 1989, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 907(1989)

In this case, we urge the Court to hold that under Title VII, as under the Fair Housing Act, ongoing violations of the law must be treated differently than discrete, unrelated acts of discrimination. Consistent with *Havens Realty*, the appropriate rule for cases such as this one is to allow liability for a continuing violation where there is discrimination prior to the 180/300 day

[5] *See Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979).

charge filing period that is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period events.

A. The 180/300 Day Charge Filing Period Is an Exhaustion Rule Not a Limitation on the Scope of the Employer's Liability

Title VII establishes two deadlines which must be met as a precondition of maintaining an action. First, the plaintiff must have filed a charge within the requisite period--here 300 days--of the unlawful practice; the filing of that charge commences the Title VII exhaustion process. Second, the plaintiff must file suit within 90 days of receiving a right to sue letter from the EEOC. Neither of these rules delineates the period of time for which relief can be awarded to redress a continuing unlawful practice.

"[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). The filing of a charge does not commence a formal adjudicatory process. Rather, the charge is the first step of an informal administrative process. The charge calls the existence of an alleged violation to the attention of the EEOC, and sets in motion an investigation. Where the investigation leads the Commission to hold that reasonable cause exists to conclude a violation has occurred, Title VII directs the Commission to attempt to conciliate the dispute. The overarching purpose of this administrative process is to resolve employment discrimination claims without the necessity of litigation. *See West v. Gibson*, 527 U.S. 212, 218-19 (1999).

The strictures that might be applied to a complaint in a civil action are not imposed on a Title VII charge. The statutory requirements regarding a Title VII charge are liberally construed, in light of Congress' awareness that these charges would ordinarily be filed by laymen without the assistance of counsel. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The scope of the investigation the EEOC may pursue is not strictly limited by the terms of the charge. *EEOC v. Shell Oil Co.*, 466 U.S. at 68-74. This Court has declined to require Title VII class members to file any charges at all, reasoning that doing so would impose an undue burden on discrimination victims. *Zipes,* 455 U.S. at 397; *cf. Bazemore v. Friday*, 478 U.S. 385, 405-06 (1986).

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 371-72 n.n.29 & 30 (1977), the Court recognized that Congress' concern for the need of time limitations in enacting the procedural steps to secure enforcement of Title VII was "directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." Title VII requires the EEOC to give the employer prompt notice so "that he would have the opportunity to gather and preserve the evidence with which to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted." *Id.* at 371 n.30 (quoting 117 Cong. Rec. 31972 (1971)).

Thus, although § 706(e)(1) addresses the time limits for filing a charge with the EEOC, it does not purport to delineate the scope of the relief that a court might subsequently provide, or the temporal or substantive range of violations which a court might ultimately address. Even with regard to the exhaustion process itself, § 706(e)(1) does not purport to establish a standard for determining which discriminatory practices occurring

within the charge filing period could fairly be said to have been encompassed by a given charge. *See* Part F *infra*.

B. The Existence of the Two Year Back Pay Rule in Section 706(g) Demonstrates That the Charge Filing Period Does Not Limit the Scope of Liability

Section 706(e)(1) provides that "[a] charge under this section shall be filed within" a specified number of days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Section 706(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C.

§ 2000e-5(g)(1). Since § 706(g)(1) limits back pay awards to no more than two years prior to the filing of the charge, it is clear that the 300 day charge filing period does not limit the period for which liability can be established.

1. The Text of Section 706(g)(1) Compels this Interpretation of Title Vii

The temporal scope of the claims for which a plaintiff can obtain back pay in a Title VII action turns on the interrelationship between § 706(e)(1) and § 706(g)(1). On the face of Title VII, it is § 706(g)(1), not § 706(e)(1), which delineates the point in time for which monetary relief in the form of back pay can be provided. It would have been nonsensical for Congress to create a back pay provision (§ 706(g)(1)) that permits plaintiffs to recover damages from their employer for a time period for which the employer could not be held liable.

Section 706(g)(1) recognizes that back pay losses caused by an unlawful practice could have been occurring for several years

prior to the filing of the charge, and provides that the employer will only be liable for those losses suffered within two years before that charge.[6] Section 706(g)(1) necessarily means that in appropriate cases, a plaintiff can seek to establish liability beyond the 180/300 day charge filing period since back pay could only "accrue" if it were caused by an actionable violation. For example, back pay could only be awarded for wages lost one year prior to the charge filing if the plaintiff showed that the discriminatory practice was occurring on or before that date.

Sections 706(e)(1) and 706(g)(1) thus address two distinct issues that arise where a discriminatory practice spans a period of time. Where a timely charge is filed (i.e., within 180 days of the last occurrence), § 706(e)(1) is satisfied, and ceases to be of relevance. Section 706(g)(1) delineates which injuries caused by that ongoing practice can be redressed, limiting back pay to amounts accruing later than two years before the charge. Read together, these provisions treat an ongoing discriminatory practice as an ongoing violation, only part of which need occur within the charge filing period in order for the entire period of violation (subject to the two year back pay rule) to be subject to judicial redress.

[6] Until now, employers filing the amicus briefs in this Court had repeatedly insisted that the two-year rule in § 706(g)(1) governed the beginning of the back pay period. Brief on Behalf of the Chamber of Commerce of the United States at 36 n.53, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389) ("[W]hen an employer is charged with a Title VII violation, his potential liability for back pay extends backwards two years prior to the date the charge is filed with the Commission. (§ 706g)."); Brief of the Texas Association of Business at 12 n.16, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (No. 76-99) ("[B]ack pay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge."); *See also* Brief for Petitioner at 17 n.29, *Occidental* (No. 76-99) (§ 706(g) provides a limitation on back pay liability of two years prior to the filing of the charge).

If, as Petitioner asserts, § 706(e)(1), means that a plaintiff cannot obtain redress for discriminatory practices occurring more than 300 days (or less) before the filing of the charge, the two year limitation in § 706(g)(1) would be meaningless. Recognizing that § 706(e)(1) cannot be construed in a manner which renders the two-year rule surplusage, the United States contends the § 706(g)(1) two year rule would still have some application even if § 706(e)(1) established a shorter 300 (or less) day limitation. The examples hypothesized by the United States are so implausible, however, as to confirm that its proposed interpretation of § 706(e)(1) must be mistaken.[7]

The existence, legislative history and manifest meaning of § 706(g)(1) make clear that the charge filing deadlines of §

[7] The United States urges, first, that the two year limitation would be important in a case in which charge filing period had been tolled, so that a charge about a long-past violation (e.g., a dismissal 4 years earlier) would nonetheless be timely under § 706(e)(1). Br. for the United States at 25. This explanation is an academic exercise in the barely conceivable. For the two year rule to have any impact, the charge filing period would have to be tolled for at least 550 days in a non-deferral state (2 years minus 180 days), and no less than 430 days in a deferral state (2 years minus 300 days). The government has not identified any case in which this unlikely circumstance occurred either before or after the adoption in 1972 of § 706(g)(1).

706(e)(1) do not themselves limit the employer's liability.[8] Even § 706(g)(1) does not declare that a continuing violation is not actionable to the extent that it occurred more than two years before a charge. Rather, § 706(g)(1) only bars a particular type of remedy--back pay--to redress continuing violations originating more than two years before a charge.

2. The Prior Decisions of this Court Treat the Two Year Rule, Not the 180/300 Day Charge Filing Period, as the Limit on Back Pay

The past decisions of this Court have repeatedly read § 706(g)(1) to mean that the two year rule defines the point in time at which back pay can begin to accrue. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 791 n.9 (1976); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 412 n.13 (1975).

In the government's view, Congress' struggle over the language of § 706(g)(1) was pointless, since the shorter § 706(e)(1) charge filing period was actually the controlling provision. The Court's understanding is obviously inconsistent with Petitioner's assumption that back pay awards have always been limited by the charge filing period, which prior to 1972 was as short as 90 days.

In *City of Los Angeles v. Manhart*, 435 U.S. 702, 722 n.42 (1978), in describing the period of time that would be encompassed by an award of monetary relief, the Court used the two year period in § 706(g) rather than the charge filing

period.

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[8]The legislative history is described in the *amicus* brief of the NAACP Legal Defense Fund filed in this case.

3. Basing the Amount of Back Pay on the Length of the Charge Filing Period Would Have Peculiar and Inconsistent Consequences

Petitioner and the United States assume that the charge filing period is simply and always a standard 300 days; were that the case all individuals who are victims of the same discrimination and who file charges on the same date would receive the same amount of back pay. In fact, the applicable charge filing period in non-federal sector Title VII cases depends, in the first instance, on whether the alleged violation occurred in a state or political subdivision which has its own statute or ordinance prohibiting employment discrimination, a so-called "deferral jurisdiction." Outside of deferral jurisdictions the charge filing period is 180 days. 42 U.S.C.§ 2000e-5(e)(1). In a deferral jurisdiction the charge filing period can be as much as 300 days. Within deferral states, the actual period is often less. Aggrieved individuals must file a charge with the EEOC within 300 days of the last occurrence of the discriminatory practice, or within 30 days after termination of proceedings by the state or local agency, whichever is less. *Id.* If the state or local proceedings are not terminated before the 300th day, the complainant can only file a charge with EEOC if he or she has earlier commenced proceedings with the state or local agency and waited for 60 days. The combined effect of these provisions is to create four different rules in deferral states.

With regard to the other statutory schemes which incorporate Title VII remedies, it would often be impracticable to use a charge filing period to determine the temporal scope of back pay. In 1972, Congress amended Title VII to extend its protections to most employees of the executive branch. 42 U.S.C. §

2000e-16. But § 717 of Title VII, unlike § 706(e)(1), did not establish any statutory charge filing deadline; rather, it authorized the Civil Service Commission (now the EEOC) to establish an administrative complaint process.

The step most analogous to a Title VII EEOC charge in this process is the filing of a "complaint" under 29 C.F.R. § 1614.106. The deadline for filing such a complaint is only 15 days, and it runs from the receipt of notice that pre-complaint counseling has failed, not from the date of the discriminatory practice. 29 C.F.R. § 1614.105(d). The deadline triggered by the discriminatory practice itself is a 45-day period to contact on EEO Counselor, a step which bears no resemblance to the filing of a charge. 29 C.F.R. § 1614.105(a)(1). Both of these periods are dramatically shorter than the Title VII charge filing periods applicable to workers outside the federal government. Nonetheless, § 717 makes § 706(g) expressly applicable to any civil action brought by such a federal employee. 42 U.S.C. § 2000e-16(d).

The 1991 Civil Rights Act for the first time applied to certain state and local political appointees the substantive protections of Title VII, 2 U.S.C. § 1220(b)(1),[9] and established for them a separate remedial process. 2 U.S.C. § 1202. Complaints must be filed with the EEOC within 180 days of the alleged violation,

[9]This provision applies to a member of an elected official's "personal staff," an employee who serves an elected official "on the policymaking level," or one who serves an elected official "as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 2 U.S.C. § 1220(a).

but under this statutory scheme, those complaints initiate a formal adjudicative process. There is no pre-complaint conciliation process analogous to a Title VII EEOC charge. Again, remedies are governed by § 706(g) of Title VII.

Under the Congressional Accountability Act of 1995, the antidiscrimination prohibitions of Title VII apply to most legislative employees. 2 U.S.C. § 1311(a)(1). There is no step comparable to the filing of an EEOC charge. Aggrieved congressional employees must first request counseling from the Office of Compliance. 2 U.S.C. § 1402. Once counseling has terminated, the worker has 15 days to request mediation by that Office. 2 U.S.C. § 1403. At the end of the mediation period, the worker has 90 days to file suit in federal district court.

2 U.S.C. § 1404. The remedy under the Act is "such remedy as would be appropriate if awarded under section 706(g) of the Civil Rights Act of 1964." 2 U.S.C. § 1311(b)(1)(A).

Finally, § 501 of the Rehabilitation Act forbids discrimination on the basis of disability in federal employment. 29 U.S.C. § 791. Although § 505 requires an aggrieved individual to complain before bringing a civil action, it establishes no deadlines for the filing of such complaints. Section 505 of the Act provides that the remedies for any violation will be those provided by §§ 706(f)-(k) of Title VII. 29 U.S.C. § 794a.

The evident purpose of Congress in incorporating the remedial provisions of § 706(g) into other statutes was to provide the same remedies that would be accorded in an action brought under Title VII. If the employer's liability for back pay is governed by the two-year rule in § 706(g), the remedy afforded to claimants who file timely charges will be the same, regardless

of the statutory scheme under which they proceed. If, as Petitioner and the United States imply, the employer's liability for back pay is limited to the charge filing period, the remedies will vary widely.

4. Neither the 180/300 Day Charge Filing Period Nor the Two Year Back Pay Rule Limit the Period for Which Compensatory And/or Punitive Damages Can Be Awarded

Congress' treatment of compensatory and punitive damages awards under Title VII is expressly, and deliberately, different than that of the back pay awards. Congress did not impose a temporal limit on compensatory and punitive awards in the 1991 amendments, despite its knowledge of the two-year time limitations on back pay awards. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) (stating that Congress is presumed to know the existing laws and their interpretation while it is drafting new legislation); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995).

The legislative history of § 706(g)(1) makes clear that the primary concern of Congress in adopting the two year rule was to protect employers from liability for back pay accruing over many years or even decades. When Congress authorized awards of compensatory and punitive damages in 1991, it recognized that such damages posed a similar risk of large awards. With regard to compensatory and punitive damages, Congress opted to solve the problem in a different manner, by imposing caps on the total amount of such awards.

A temporal limitation on compensatory and punitive awards would often be impracticable as well as ineffective. The pain

and suffering inflicted, for example, by sexual harassment cannot in any meaningful manner be allocated to particular months or weeks, and thus, could not effectively be limited by a rule such as § 706(g)(1) or § 706(e)(1). Clearly, the courts are not at liberty to add the very limitation which Congress declined to utilize.

C. The Continuing Violation Doctrine Is Consistent with the Statutory Language in Section 706(e)(1)

Petitioner urges this Court to hold that Title VII's charge-filing requirement is triggered by each separate occurrence of any "discrete act" of discrimination.[10] Section 706(e)(1), however, does not require the filing of a charge within 180 or 300 days of each "discrete act." Rather, the actual language in Title VII requires the filing of a charge within the specified number of days after an "unlawful employment *practice*" and provides a statutory basis for the continuing violation doctrine. 42 U.S.C. 2000e-5(e)(1) (emphasis added).

This Court has repeatedly recognized that "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). When looking to the explicit language of a federal statute, the words therein should be "interpreted as taking their ordinary, contemporary, common meaning," unless those words are otherwise defined. *Perrin v. United States*, 444 U.S. 37, 42 (1979). When constru-

[10] Petitioner's Brief at 2, 10, 11, 13 n.3, 14, 15 n.5, 22, 29.

ing the statute, "it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (citations omitted).

Title VII repeatedly refers to "unlawful employment practice(s)" in contexts where it clearly refers to an ongoing violation.[11]

Nowhere does Title VII use the language "discrete acts" of discrimination or any equivalent language. According to both lay and legal definitions, the term "practice" includes a course of recurring conduct, rather than only singular, discrete acts. *Webster's Ninth New Collegiate Dictionary* 923 (1991) (defining "practice" as "a repeated or customary action"); *Black's Law Dictionary* 1172 (6th ed. 1990) (defining "practice" as "[r]*epeated* or customary action; habitual performance; a *succession* of acts of similar kind" (emphasis added)).

D. The Continuing Violation Doctrine Is Embodied in an EEOC Regulation and Management Directive Entitled to *Chevron* Deference

The Solicitor General notes in passing that the EEOC disagrees with the position set forth in the government's brief. The United States mentions only a single unreported April 2001 decision by the EEOC. Br. for the United States at 23. This passing reference seriously understates the longevity, consistency and legal significance of the Commission's position.

[11] For example, § 706(g)(1) itself authorizes relief where an employer is "engaging in an unlawful employment practice," a phrase which necessarily refers to ongoing conduct rather than a single discrete act. 42 U.S.C. § 2000e-5(g); *see also* 42 U.S.C. §§ 2000e-2(h), 2000e-2(i), 2000e-2(k), 2000e-6(a).

For more than thirty years, the EEOC has maintained that certain recurring discrimination, which it refers to as "continuing violations," warrant distinct treatment for Title VII limitations purposes.[12] The EEOC has consistently taken the position, both in its own cases and in amicus briefs, that redress can be provided for pre-charging period discrimination that is part of a continuing violation and that the two year back pay rule in § 706(g)(1) applies to such violations.[13] The EEOC's understanding of the law is codified in its Compliance Manual.[14] The

[12] *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1235 n.1 (N.D. Ga. 1968); *Cox v. U.S. Gypsum Co.*, 284 F. Supp. 74, 77 (N.D. Ind. 1968).

[13] *E.g.*, Brief of the EEOC as Appellee at 42-46, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580 (9th Cir. 2000) (No 98-16454) (sexual harassment a continuing violation); Brief of the EEOC as Amicus Curiae, *Ashley v. Boyle's Famous Corned Beef Co., Inc.*, 66 F.3d 164 (8th Cir. 1995) (No. 94-2174) (discrimination in salary and annual raises a continuing violation); Brief of the EEOC as Amicus Curiae, *Lee v. Air Prods. and Chem., Inc.*, 36 F.3d 1093 (4th Cir. 1994) (No. 94-1119) (repeated denials of promotion a continuing violation); Brief of the EEOC as Amicus Curiae, *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) (No. 94-3993) (sexual harassment a continuing violation); Brief of EEOC as Amicus Curiae, *Sendall v. Boeing Helicopters*, 22 F.3d 303 (3d Cir. 1994) (No. 93-1814) (salary discrimination as a continuing violation).

[14] 1 EEOC Compliance Manual § 22.6(a) [BNA] (2001) ("When cause has been found andthe relief to which aggrieved persons are entitled includes back pay, back pay should be sought for a period from the [date of violation] or the beginning of a continuing

Manual includes a detailed explanation of the types of practices which the Commission believes constitute a continuing violation.[15] The EEOC's construction is, at the least, entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Congress, however, has accorded to the EEOC an even more authoritative role with regard to the application of Title VII to federal employees or applicants. Title VII expressly accords to the EEOC responsibility for adopting legislative regulations governing claims of discrimination in federal employment. 42 U.S.C. § 2000e-16(b). That responsibility includes assuring that victims of discrimination in federal employment receive the remedies provided by § 706(g)(1). 42 U.S.C. § 2000e-16(d).

The Commission's regulations require that in any case in which discrimination has been found, the victim must be awarded "[p]ayment . . . on a make whole basis for *any* loss of earnings the person may have suffered as a result of the discrimination," 29 C.F.R. § 1614.501(a)(4) (emphasis added), subject only to one limitation, that "back pay liability under title VII . . . is limited to two years prior to the date the complaint was filed." 29 C.F.R. § 1614.501(c)(1). In promulgating these

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violation (but not more than two years before the charge filing date or before the ADA applies) plus the period from the charge filing date until an agreement is executed."); *Id.* § 22.5(a) (Where class discrimination is indicated, "[i]f the alleged violation would constitute a continuing violation . . . identify persons for whom remedial relief may be sought back to the beginning of the period of the violation. . . . Generally, the period should extend back at least 2 years before the filing of the charge.").

[15] EEOC New Compliance Manual § 2, part 2-IV(C)(2).

federal sector regulations, the EEOC has twice emphasized that it regards discrimination victims as entitled to back pay from the date two years prior to the date when the formal administrative process was initiated.[16]

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[16] The Commission's comments were made in connection with the provision, now found in 29 C.F.R. § 1614.204(l)(3), requiring in the case of class complaints remedial action for any "policy or practice" in existence within "45 prior to [complainant's] initial contact with the Counsellor." Individuals aggrieved by alleged discrimination must initiate the administrative process by contacting a counsellor within 45 days of the discrimination.

When the Commission promulgated the 1992 version of these regulations, it explained:

"[t]he 45-day time limit in this section defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member." Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12, 644 (Apr. 10, 1992). The Commission made this point again when it amended the regulations two years ago.

> "[T]he 45-day time limit in section 204(l)(3) defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member. . . . Under the continuing violation theory, moreover, incidents occurring earlier than 45 days before contact with the counselor must also be remedied provided that the initial contact with the counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. That is, where contact with the counselor is timely as to one of the events com-

The Commission has also issued pursuant to its § 717 authority an order, Management Directive 110, instructing federal agencies how they are to administer the administrative complaint process.[17] Management Directive 110 expressly requires agency officials to treat complaints of continuing violations differently than charges of discrete violations:

> [I]ncidents that occurred outside the 45-day time limit should be investigated and remedied to the extent that they are sufficiently interrelated to a timely raised incident such that a continuing violation has been established. A continuing violation is a series of related acts, one or more of which falls within the limitations period, that are tied together with a common theme uniting the alleged discriminatory acts into a continuous pattern. When determining if a continuing violation exists, the following information is relevant to, but not necessarily dispositive of, the issue: whether the same officials were involved in the incidents, whether the incidents were similar in nature, and whether they recurred or were of a more isolated nature.(Ch. 5, part III(A)(3)). Both Management Direc-

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prising the continuing violation, then the counseling contact is timely as to the entire violation."

Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,653 (July 12, 1999).

17 *See* Management Directive 110, *at* http://www.eeoc.gov/federal/md110.html.

> tive 110[18] and the EEOC federal sector regulations have the force of law and are binding on federal agencies, including the Department of Justice, when they implement the Title VII administrative process. The brief submitted by the United States in this action appears to be an unacknowledged attack on the validity of the regulations and Management Directive 110.

Under § 717(c) of Title VII, the Commission also engages in formal adjudication of appeals from agency, decisions regarding discrimination complaints by federal employees. *See, e.g., West v. Gibson*, 527 U.S. at 216. The Commission's invocation of the two year back pay is reflected as well in a large body of decisions adjudicating the discrimination claims of federal employees. *See* Supplemental Appendix. Agencies litigating claims before the EEOC expressly rely on the two year rule as delineating the proper scope of a remedial order.[19] The EEOC federal

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18 The transmission memorandum accompanying the issuance of the 1999 revised Directive noted, "The Commission's instructions are directive in nature, and heads of federal agencies are responsible for prompt and effective compliance with Commission Management Directives . . . . Since the commission's guidance is binding in nature, federal agencies are required to comply with it." Memorandum to the Heads of Federal Agencies (Oct. 28, 1999).

19 *E.g.*, Agency's Request for Reconsideration at 5, Stone v. O'Neill (Appeal No. 01A-02-572) ("The two-year period for which back pay may be awarded begins on the date the Complainant files a formal complaint with the commission. . . . Complainant filed the EEOC complaint on December 18, 1997. . . . Therefore, Complainant is not entitled to back pay [for the period before] December 18, 1995."). (Bureau of the Public Debt, Department of the Treasury.)

sector adjudications are also replete with applications of the Commission's view of the continuing violation doctrine.

The EEOC federal sector regulations, Management Directive 110 and the interpretation of Title VII embodied in the Commission's formal adjudications, are all entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). A similar degree of deference is accorded where an agency elucidates a statute through formal adjudication. *United States v. Mead Corp.*, __ U.S. ___ , 121 S. Ct. 2164, 2172-73 n.11 (2001). Certainly, *Chevron* deference is warranted on both grounds.

E. The Interpretation of Other Statutes Does Not Preclude Recognition of the Continuing Violation Doctrine under Title VII

Petitioner relies heavily on this Court's decisions regarding ongoing violations of the Clayton Act and RICO, insisting that they establish a general rule of law__"the accrual rule"--under which the statute of limitations runs separately on each occasion when a violation causes actionable injury. Pet. Br. 11, 20, 22. The United States suggests these cases establish a general principle of law regarding the legal definition and significance of a "continuing violation." Br. for the United States at 12. The RICO cases in question turn on the limitations rules for Clayton Act cases, since RICO itself has no limitations period, and the decisions of this Court have concluded that RICO cases should be governed by the standard for Clayton Act claims.[20]

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[20] *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997); *Agency Holding Corp. v. Malley -Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). *Klehr* also rejected the "last predicate act" rule because under it the limitations period could be extended for several decades. 521 U.S. at 187-88; *see Rotella v. Wood*, 528 U.S. 549, 554 (2000). That reasoning is clearly inapplicable to Title VII, since § 706(g)(1) limits pre-charge back pay to two years, half the Clayton Act limitations period.

The underlying Clayton Act cases indeed hold, as Petitioner suggests, that the accrual of each claim is of critical importance; whenever a statutory violation causes a discrete injury, a cause of action accrues with regard to that harm, and an action must be commenced within four years of the date of accrual. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). An ongoing violation of the Clayton Act results in a series of actionable injuries; each of those claims in turn is extinguished if no action is commenced with four years[21] after the date of accrual. But the Clayton Act accrual rule (and the RICO cases which incorporate it by reference) derives not from any general principle of jurisprudence, but from the specific terms of the Clayton Act limitations provision:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action *accrued*.

15 U.S.C. § 15b (emphasis added). The date of accrual is of controlling importance under the Clayton Act because the statute expressly so provides. The wording of § 15b expressly de-

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[21] The four year rule in Clayton Act and RICO cases reflects a congressional judgment that for that period of time, memories were likely to be reliable and evidence still retained. *See Klehr*, 521 U.S. at 186. That judgment obviously undermines Petitioner's contention that Congress believed that in Title VII cases memories and evidence would be unavailable after a mere 180 to 300 days.

lineates a limitation on the permissible scope of any civil action, and expressly excludes redress for any claims which "accrued" more than four years earlier. The terms of § 706(e)(1) are emphatically different.[22]

Cases under the National Labor Relations Act provides even less support for Petitioner. This Court has invoked the NLRA where there was under that statute a substantial body of experience prior to 1964, or a clear and authoritative interpretation of the law. Neither are present here. In virtually all disputes arising under the NLRA, the unfair labor practice that gave rise to a back pay claim was the dismissal of a worker; the types of recurring violations that occur under Title VII, such as salary or hostile work environment discrimination claims, are virtually unknown in NLRA litigation. Petitioner and the United States can identify in the decades of pre-Title VII NLRA proceedings only two cases that even arguably present an ongoing violation of the rights of a complainant, and the parties in those cases did not litigate the period of time for which back pay might be awarded for a recurring violation.[23] The court of appeals in

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[22] In *Klehr*, the plaintiffs relied on the continuing violation decision in *Havens Realty* and several lower court Title VII decisions. Brief for Petitioners at 4, 7, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (No. 96-663). Neither party nor any of the numerous *amici* questioned the propriety of applying the *Havens Realty* continuing violation doctrine in discrimination cases. This Court's decision in *Klehr*, which carefully avoided mention of Title VII or Fair Housing Act cases, cannot plausibly be read to reject a line of decisions which no party had questioned.

[23] In *Melville Confections, Inc v. NLRB*, 327 F.2d 689, 690 (7th Cir. 1964), the Board had awarded only prospective injunctive relief.

NLRB v. Pennwoven, Inc., 194 F.2d 521, 525 (3d Cir. 1952), concluded that no such recurring violation had even occurred. This is far to thin a reed to support any inference about the intent of Congress.

The provisions of the NLRA, moreover, are in several material respects different than Title VII. First, the NLRA has no two year (or other) back pay rule comparable to § 706(g)(1). Second, unlike the NLRA, Title VII expressly permits enforcement action in the absence of *any* timely predicate charge. Congress clearly intended to bar any proceedings under the NLRA that had not been the subject of a charge filed within 180 days of the alleged unfair labor practice; absent such a timely predicate charge the General Counsel cannot institute proceedings before the Board. But the 1964 provisions of Title VII expressly permitted the Department of Justice to bring a pattern and practice suit regardless of whether there had ever been a timely charge about the discrimination in question. 42 U.S.C. § 2000e-6.

On the other hand, Morgan's proposed treatment of ongoing violations is not unique to Title VII. In the criminal law, an ongoing conspiracy, larceny or embezzlement is dealt within the same manner. So long as the last act of the ongoing offense occurred within the limitations period, the perpetrator can be prosecuted for the entire series of events. 3 *Wharton's Criminal Law* §§ 93, 94, 370 (15th ed. 1995).

F. Where the Discrimination Prior to the Charge Filing Period Is Sufficiently like or Related to the Discrimination Occurring Within the Charge Filing Period That the Employer Is on Notice of the Need to Investigate Those Earlier Events, Plaintiffs Should Be Allowed to Establish Liability for the Earlier Acts

The continuing violation doctrine was generally accepted in the era when Congress adopted the 1972 amendments to Title VII. Subsequent decisions applying that doctrine, and using a standard similar to that of the Ninth Circuit below, can be found in the Second,[24] Third,[25] Fourth,[26] Sixth,[27] Eighth,[28] and District

[24] *See Fitzgerald v. Henderson,* 251 F.3d 345, 359 (2d Cir. 2001); *Bonner v. Guccione,* 178 F.3d 581, 583-84 (2d Cir. 1999); *Cornwell v. Robinson,* 23 F.3d 694, 704 (2d Cir. 1994).

[25] *See Courtney v. La Salle Univ.,* 124 F.3d 499, 506 (3d Cir. 1997); *Rush v. Scott Specialty Gases, Inc.* 113 F.3d 476, 481-82 (3d Cir. 1997); *West v. Phila. Elec. Co.,* 45 F.3d 744, 754-55 (3d Cir. 1995).

[26] *See Beall v. Abbott Labs.,* 130 F.3d 614, 620-21 (4th Cir. 1997); *Taylor v. Home Ins. Co.,* 777 F.2d 849, 856 (4th Cir. 1985).

[27] *See Burzynski v. Cohen,* No. 99-4298, 2001 U.S. App. LEXIS 18997 (6th Cir. Aug. 23, 2001) (Title VII and ADEA); *Haithcock v. Frank,* 958 F.2d 671, 677-78 (6th Cir. 1992) (Title VII); *Hull v. Cuyahoga Valley Bd. Of Educ.,* 926 F.2d 505, 510-11 (6th Cir. 1991); *Roberts v. N. Am. Rockwell Corp.,* 650 F.2d 823, 827-28 (6th Cir. 1981).

[28] *See Jenson v. Eveleth Taconite Co.,* 130 F.3d 1287, 1302-03 (8th Cir. 1997); *Varner v. Nat'l Super Mkts.,Inc.,* 94 F.3d 1209, 1214 (8th Cir. 1996); *Gardner v. Morris,* 72 F.2d 1271, 1270 (8th Cir. 1985); *Scott v. St. Paul Postal Serv.,* 720 F.2d 524, 525 (8th Cir. 1983); *Gross v. United States,* 676 F.2d 295, 299-300 (8th Cir. 1982).

of Columbia Circuits.[29] Disputes about what constitutes a "continuing violation" are not about the inherent meaning of some general legal phrase, like "*res judicata*" or "jurisdiction." Rather, in the Title VII context "continuing violation" denotes those situations in which it is appropriate to permit a plaintiff to obtain redress for pre-charge filing discrimination because it has a sufficient connection to discrimination occurring within the charge filing period.[30]

> The proper formulation derives from the text of Title VII itself and from the purposes of a statute of limitations. So long as the pre- and post- charge filing period discrimination can fairly be said to constitute the same "practice," the exhaustion requirements of § 706(e)(1) have been met. Decisions of this Court have made clear that the scope of the subject matters encompassed by Title VII charge will be broadly construed. *EEOC v. Shell Oil Co.*, 466 U.S. at 68-74.[31]

[29] *See Anderson v. Zubieta,* 180 F.3d 329, 337 (D.C. Cir. 1999); *Valentino v. U.S. Postal Serv.,* 674 F.2d 56, 65 (D.C. Cir. 1982).

[30] A number of district courts have recognized that where a continuing violation is alleged, concerns as to a defendant's prejudice are absent or diminished and an employer maintaining an unlawful practice is in a less sympathetic position when seeking repose; the continued nature of the policy represents its affirmative perpetuation and is susceptible to characterization as a conscious waiver of limitations period protection. *EEOC v. Home Ins. Co.*, 553 F. Supp. 704, 713 (S.D.N.Y. 1982); *see also EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1087 (C.D. Ill. 1998); *Glass v. IDS Fin. Servs., Inc.*, 778 F. Supp. 1029, 1054 n.41 (D. Minn. 1991).

[31] This is certainly the position of the overwhelming number of circuit courts. *See, e.g., EEOC v. Keco Indus.,* 748 F.2d 1097, 100-01

> Whether several discriminatory acts ought be said to involve a single "practice" should be resolved in light of the central purpose of Title VII's Charge Filing Requirement, to provide a defendant with a reasonable opportunity to preserve evidence and to interview witnesses while their memories are still reliable.

We urge the Court to adopt the following standard to delineate the scope of the continuing violation doctrine under Title VII:

> Discrimination occurring prior to the charge filing period may be redressed where that earlier discrimination is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period events.

This standard will ordinarily be met where the form of discrimination is the same. *E.g., Havens Realty,* 455 U.S. at 380-81 (racial steering). An employer which received a charge of salary discrimination would readily understand what facts (before and during the charge filing period) should be looked into. The particular purpose alleged in a charge (e.g. retaliation for resisting sexual harassment) might also draw the employer's attention to specific matters (i.e. the underlying harassment) earlier in the two year period.

(6th Cir. 1984); *Ong v. Cleland,* 642 F.2d 316, 318-19 (9th Cir. 1981); *Hicks v. ABT Assoc., Inc.,* 572 F.2d 960, 966 (3rd Cir. 1978); *EEOC v. Gen. Elec. Co.,* 532 F.2d 359, 365-67 (4th Cir. 1976); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.,* 538 F.2d 164, 167-68 (7th Cir. 1976) (en banc); *EEOC v. W. Publ'g Co.,* 502 F.2d 599, 602-03 (8th Cir. 1974); *Macklin v. Spector Freight Sys. Inc.,* 478 F.2d 979, 987-88 (D.C. Cir. 1973); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 465-66 (5th Cir. 1970).

The Title VII charge in the instant case easily meets that standard. EEOC Charge, Morgan Decl., CD No. 106. First, the charge identified two specific forms of discrimination--unwarranted disciplinary measures and denials of training--which occurred both inside and prior to the charge filing period. Second, the charge identified a specific purpose--retaliation--and made clear that the protected activity which had allegedly triggered the repeated retaliation had occurred as far back as 1991. Third, the charge alleged a repeated array of discriminatory practices likely to create a hostile work environment. Morgan was clearly entitled to the benefit of the continuing violation doctrine.

II. IN DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT EXISTED WITHIN THE CHARGE FILING PERIOD, THE TRIER OF FACT MUST CONSIDER EARLIER ACTS OF HARASSMENT OR OTHER TYPES OF DISCRIMINATION WHICH MAY HAVE CREATED THE HOSTILE ENVIRONMENT

There is a natural affinity between the continuing violation doctrine and a claim of a hostile work environment. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989); *West v. Phila. Elec. Co.*, 45 F.3d 744, 755 (3rd Cir. 1995); *O'Rourke v. City of Providence*, 235 F.3d 713, 727-28 (1st Cir. 2001). In

2001). In the instant case, the district court's ruling that Morgan could not rely on acts of harassment or other discrimination that occurred before May 3, 1994[32] to establish the existence of a hostile work environment during the 180/300 day charge filing period rested on a fundamental misunderstanding of the nature of a hostile environment claim. Unlike a discriminatory hiring or firing decision, an act of harassment is never actionable per se.[33] Rather, in a hostile environment case, it is the existence of the resulting environment--not the incidents that combined to produce it--that constitutes the violation. In both *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998), the carefully framed standard for employer liability was predicated upon an *actionable hostile environment*. This Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 18-19 (1993), concerned "the definition of a discriminatorily 'abusive work environment' (also known as a 'hostile work environment') under Title VII."

That the hostile environment itself, not the incidents that caused it, constitutes the actionable Title VII violation follows

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[32] This analysis discusses what would constitute a hostile environment *during* the charge filing period. As we explain *supra*, where a plaintiff demonstrates that a hostile environment which continued into the charge filing period first came into existence on an earlier date, the continuing violation doctrine also permits the plaintiff to obtain relief for the *pre*-charge filing period violation.

[33] Many acts of discrimination, such as a discriminatory demotion, could contribute to a hostile environment. Such an incident would be actionable by itself insofar as the plaintiff sought back pay or restoration to the lost position. But to the extent that the plaintiff asserted the demotion had contributed to a hostile environment, only the environment itself would be actionable.

from several aspects of harassment law. First, save in exceptional circumstances, a single incident of harassment cannot create a hostile environment, and thus could not by itself create an actionable claim. The cumulative effect of that first and later incidents may do so, but those subsequent developments could not render the first incident illegal *nunc pro tunc.*

Second, an actionable hostile environment claim only exists if the victim perceives the environment as hostile or abusive. *Harris*, 510 U.S. at 21-22. The victim's subsequent perception however, could not alter retroactively the legality of the harassment. Third, an employer can be liable under Title VII if it negligently failed to protect the victim from a hostile environment created by harassment by fellow employees or customers. *Faragher,* 524 U.S. at 789; *Burlington Industries*, 524 U.S. at 759. Yet such harassment by itself could ordinarily not violate Title VII.

In harassment cases, as in any other, "the critical question is whether any present *violation* exists." *Evans*, 431 U.S. at 558 (emphasis in original).[34] Once a hostile environment has been

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[34] Where an employer unlawfully denies a plaintiff seniority, that denial itself is a complete violation; the consequent "effect" or "impact" of that violation, including resulting loss of employment, do not themselves constitute violations. *Evans*, 431 U.S. at 558.

But in a hostile environment case, incidents of harassment do not themselves constitute a violation; a violation occurs only if and because those incidents combine to create a hostile environment. Harassment brings about an actionable claim where it has the "effect of . . . creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *see id.* at 66

created, that violation exists so long as that environment itself endures. It would be nonsensical to suggest that a present hostile environment violation exists only during those often fleeting moments when new acts of harassment are occurring.

The district court thus erred in holding that acts of harassment, i.e., those occurring before May 3, 1994, were "time barred." Only violations can be time barred, not events which may have brought them about. If incidents of harassment more than 300 days prior to a charge could be "time barred", there could never be an actionable hostile environment on the 300th day, because there would not be any prior incidents on which a plaintiff could rely.

In determining whether a hostile environment existed in that period, the trier of fact must consider all the earlier harassment or other acts of discrimination which might have contributed to the existence of such an environment. The relevant restriction on the significance of temporally more remote incidents is not the statute of limitations, but the trier of fact's assessment of causation. Incidents years prior to the 300th day may not to contribute greatly to the existence of a hostile environment within the charge filing period. In the absence of additional incidents, a hostile environment might even dissipate over time.[35]

(creating a hostile environment through discriminatory practices); *id.* at 67 (creating a hostile work environment through harassment). Thus in a hostile environment case, the *effect* of the harassment, far from being a non-actionable incidental consequence, is an essential element of the claim.

[35] In some circumstances, of course, that would not occur. If a victim had been sexually assaulted by a co-worker, a hostile environment would likely continue indefinitely if that assailant were permitted to work in the same facility.

But while the passage of time will reduce the impact of past incidents of harassment, the assessment of the weight of such evidence will ordinarily be a matter for the trier of fact, not for the court on summary judgment.

In the instant case, the district court's order and subsequent jury instructions improperly precluded Morgan from using events occurring prior to May 3, 1994, to establish even the existence of a hostile environment during the charge-filing period.

II. WHETHER MORGAN BELIEVED PRIOR TO 1995 THAT HE WAS THE VICTIM OF UNLAWFUL DISCRIMINATION IS IRRELEVANT

The notice requirement which Petitioner seeks to graft into the "continuing violation doctrine" analysis is totally inapposite to appropriate Title VII jurisprudence. This requirement that the Fifth and Seventh Circuits impose upon plaintiffs improperly shifts the inquiry from whether *vel non* there is a current actionable Title VII violation by the employer to plaintiffs' state of mind at some point in the continuum of events or policies or practices upon which the action is based. *See Galloway v. Gen. Motors Serv. Parts*, 78 F.3d 1164 (7th Cir. 1996); *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983).[36]

Rather, if a violation is alleged which occurred within the 300 day charge filing period, the question whether the plaintiff

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[36] *But see Cuddyer v. The Stop & Shop Supermarket Co.*, 434 Mass. 521, 534-36, 750 N.E.2d 928, 938-39 (2001) (criticizing the "revelatory standard" articulated in *Galloway* and *Berry*).

formed a belief that he was the victim of actionable employment discrimination at an earlier time becomes moot. Indeed, requiring plaintiffs to determine the legal ramifications of an employer's actions flies in the face of the Congressional mandate that this remedial statute be interpreted in a manner that provides for the maximum relief for aggrieved parties and must not be countenanced by this Court. *Cf. Franks*, 427 U.S. at 763-64; *Albemarle Paper Co.*, 422 U.S. at 418-22 (stating that Congressional purpose concerning Title VII was to effectuate the highest national priority of providing complete relief for those suffering from employment discrimination).[37]

In *Zipes*, this Court defined the 180-300 day charge filing period so as to "honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." 455 U.S. 398. A desire to encourage prompt filing of claims cannot un-

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[37] Any requirement that an aggrieved person make a binding decision as to when further efforts at informal conciliation with his employer would be futile places him in an impossible position. Indeed, requiring such a determination by a lay person would be especially bothersome in the hostile atmosphere situation where even the most cursory review of the reported authorities establishes the courts' continued inability to identify what degree of behavior is "severe" or, more importantly here, "pervasive," particularly where there is a continuing employment relationship. Moreover, if one is exhausting the company's grievance process as required by *Ellerth* and *Faragher*, the employer can manipulate the requisite degree of "permanence" that an employee must intuit. Thus, any such requirement would certainly eviscerate this Court's apt recognition of the persons normally filing a charge and their limitations as lay persons to make any such determinations. *See Love v. Pullman Co.*, 404 U.S. at 527.

dermine the broad remedial purposes of Title VII - dating the charge filing period from the first act or some intermediate act (i.e., when the plaintiff realized that she had a claim) instead of the last act destroys the balance created by this Court in *Zipes*.

IV. MORGAN IS ENTITLED TO A NEW TRIAL TO DETERMINE AMTRAK'S LIABILITY WITHIN THE CHARGE FILING PERIOD

During the course of the trial, the district court repeatedly barred or severely limited the evidence from outside the 300-day charge filing period which should have been used to determine Amtrak's liability for discrimination within the charge filing period. Morgan expressly raised these issues on appeal.[38] The Ninth Circuit, although expressing serious reservations about the actions of the district court, stopped short of resolving that aspect of the appeal. *Morgan*, 232 F.3d at 1018.

A. The District Court Erred in Limiting Evidence of The Hostile Work Environment from Outside the 300-Day Charge Filing Period

As set forth herein, the district court disregarded this Court's jurisprudence when it required the jury to look at discrete acts rather than the environment as a whole to determine the hostile environment claim. *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765 (referring to an "actionable hostile *environment* created by a supervisor") (emphasis added). This Court has clearly mandated that courts should consider a broad range of conduct. *See Harris*, 510 U.S. at 22-23; *Faragher*, 524 U.S. at 787-88. Indeed, the Court articulated just last term that

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[38] Appellant's Opening Brief at 2-3.

"[w]orkplace conduct is not measured in isolation; instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by "looking at all the circumstances."'" *Clark County Sch. Dist. v. Breeden*, __ U.S. __, 121 S. Ct. 1508, 1510 (2001) (internal citations omitted).

In both *Meritor* and *Faragher*, this Court explicitly referenced evidence of harassing conduct that occurred outside the applicable limitations period. *See Meritor*, 477 U.S. at 59-60 (considering evidence spanning a number of years); *Faragher*, 524 U.S. at 782 (considering evidence spanning a five-year period).

The district court below failed to heed this Court's oft-repeated guidance. It deprived the jury of the necessary opportunity to evaluate the nature of the overall environment to which Morgan was subjected through a consideration of "all the circumstances." Thus, the determination that the hostile environment was not "sufficiently severe or pervasive" is fundamentally flawed and must be reversed.

B. The District Court Erred in Limiting Evidence of Intentional Discrimination from Outside the 300-Day Charge Filing Period

The district court also erred in its assessment of the legal consequences of the expiration of the charge filing period regarding a particular discriminatory incident. Decisions of this Court have long made clear that evidence of intentional discrimination from outside the charge filing period can be crucial for proving intentional discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (evidence from more than a year outside the charge filing period may be relevant to respondent's claims); *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 n.2 (1989) (examining manager's discriminatory behavior toward other African American employees).

Similarly, in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 n.2 (1983), this Court again looked at evidence well outside the charge filing period. ("Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974."). Most recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097, 2111 (2000), this Court found crucial support for the plaintiff's claim of an unlawful 1995 dismissal in evidence suggesting that in 1993, the employer had singled out plaintiff for investigation and discipline while ignoring a younger manager with a similar record.

The district court erred in its utter failure to correctly apply the Federal Rules of Evidence. Rule 401 defines relevant evidence very broadly.[39] Pursuant to Rules 401, 403 and 404, courts have admitted evidence from outside the 300-day charge filing period to prove motive and intent.[40]

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[39] "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

[40] *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 320 (3d. Cir. 1981) (en banc) ("Evidence of the prior actions was admitted, as the trial court noted, under Fed. R. Evid. 404(b), to show motive [or] intent . . . . The injunction was issued . . . because . . . a pattern or practice of violations occurred over a long period of time which extended

In the Final Pretrial Scheduling Order, the district court ruled that although Mr. Morgan could testify to his work history, he could not "characterize the events underlying his time-barred or adjudicated claims as 'discrimination' or 'retaliation,'" nor could he "elicit such characterization from other witnesses." CD at 176. During the trial, beginning with the voir dire, the court repeatedly issued limiting instructions indicating that this evidence was only for context and background. For example, at one point the court told the jury such evidence would "not be part of anything you will be asked to decide in this case." *See* Trial Tr. at 431-33. Because the jury could not rely on all of the admissible evidence, whatever interpretation the Court chooses to adopt for the continuing violation doctrine, justice requires a new trial in this case.

V. THIS CASE SHOULD BE REMANDED TO THE NINTH CIRCUIT TO ALLOW IT TO REVIEW THE DISTRICT COURT'S LIMITATION AND EXCLUSION OF EVIDENCE OF DISCRIMINATION AND HARASSMENT

well within the period of the statute of limitations, and was likely to continue in the future.") (internal citations omitted); *see also Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1998) ("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries"(quoting *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987))); *Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986).

In *Breeden*, 121 S. Ct. at 1509, and *Faragher*, 524 U.S. at 782, this Court subscribed to the view that evidence of harassment against other members of the protected class is relevant to a hostile work environment claim by explicitly referencing evidence that the complainant's supervisors had engaged in harassing conduct directed toward other women in the workplace. *See also Aikens*, 460 U.S. at 714 n.3.

Many circuit courts have interpreted the Federal Rules of Evidence to evidence of harassment or discrimination against other members of the protected class to establish plaintiff's individual claim of harassment. *See, e.g., Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110 (3d Cir. 1999).[41] Numerous circuit courts have found that evidence of discriminatory conduct directed at others in the workplace is relevant to a plaintiff's individual claim. *See, e.g., Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1134 (4th Cir. 1988).[42]

The district court's exclusion of evidence of discriminatory behavior by Morgan's supervisors inappropriately restricted Morgan's presentation of his case. Therefore, regardless of this Court's holding on the continuing violation

[41] *See also Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995); *Glass v. Phila. Elec. Corp.*, 34 F.3d 188, 194 (3d Cir. 1994); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986).

[42] *See also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344-45 (6th Cir. 1992); *Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983).

doctrine, the case should be remanded to the Ninth Circuit so that it may rule on these unresolved evidentiary issues.

CONCLUSION

Continuous violations of Title VII are especially harmful to public policy. They involve an ongoing pattern of discrimination rather than a single isolated act of discrimination. As such, they are a matter of special concern, and some flexibility in interpreting the charge filing requirement is warranted to stamp them out.

Amtrak's assertions that Title VII violations are less complex than other unlawful practices or "easy to detect" are ludicrous. Its assertion that hostile environment cases are "rare" is equally ridiculous. To allow Amtrak to escape responsibility for the three years of blatantly racist and unlawful conduct by its top managers which occurred outside the 300 day limitations period would be intolerable. It would severely compromise the goal of Title VII to root out and eradicate entrenched and ingrained forms of discrimination in the workplace.

For all of the reasons stated herein, the Ninth Circuit decision should be affirmed.

Respectfully Submitted,

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RESPONDENT'S SUPPLEMENTAL APPENDIX

Additional Statutory Provisions Involved

15 U.S.C. § 15b.

Any action to enforce any cause of action under section 4, 4A, or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

42 U.S.C. § 2000e-5(e)(1).

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged

unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(g)(1).

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-16(b) - (d).

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall:

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to:

> (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
>
> (2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

Additional Regulatory Provisions Involved

29 C.F.R. § 1614.501(a)(4).

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, which shall include the following elements in appropriate circumstances . . .

> (4) Payment to each identified victim of discrimination on a make whole basis for any loss of earn-

ings the person may have suffered as a result of the discrimination . . . .

29 C.F.R. § 1614.501(b)(3).

(b) Relief for an applicant. . . .

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

29 C.F.R. § 1614.501(c)(1).

(c) Relief for an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

EEOC Administrative Determinations

Wood v. Richardson, 1998 WL 746368, at *7.

Boykin v. Shalala, 1998 WL 745686, at *2.

Douglas v. West, 1997 WL 377511, at * 11.

Carney v. Brown, 1996 WL 506285, at *9.

Carter v. Dalton, 1995 WL 619313, at *1.

Alexander v. Cisneros, 1995 WL 576911, at *8.

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Cotton v. Shalala, 1996 WL 33170688, at *6-*8.

Davis v. Bentsen, 1994 WL 748457, at *4.

Miller v. Runyon, 1993 WL 1510049, at *9.

Joseph v. Runyon, 1993 WL 1509383, at *3.

Walker v. Gordon, 1993 WL 1507466, at *5.

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Guess v. Barr, 1992 WL 1371923, at *1.

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Fitzgerald v. Runyon, 1990 WL 1108836, at *1.

Caouette v. Frank, 1990 WL 2566, at *5 n.2.

King v. Cavazos, 1990 WL 1008026, *4.

Amador v. Abdnor, 1989 WL 1005970, at *1.

Mahan v. Frank, 1989 WL 1006514, at *4 n.2.

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(10)

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IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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28 pp

TABLE OF CONTENTS

	Page
I. SECTION 706(g)'s TWO-YEAR CAP ON RECOVERY OF BACKPAY IS NOT A REPUDIATION OF SECTION 706(e)'s LIMITATION PERIOD	2
A. Section 706(e) Is A Statute of Limitations and Thus Limits The Amount of Recoverable Damages	3
B. Section 706(g)'s Two-Year Cap on Backpay Is Not the Only Limitation on the Recovery of Damages Under Title VII	4
II. THE EEOC'S PRONOUNCEMENTS ON THE CONTINUING VIOLATION DOCTRINE ARE NOT ENTITLED TO DEFERENCE	7
III. THE "NOTICE" LIMITATION ON THE CONTINUING VIOLATION DOCTRINE IS APPROPRIATE	11
A. Cases Involving "Patterns" of Discrimination Are Not Subject to Any Special Rule	11
B. The Notice Limitation On the Continuing Violation Doctrine Comports With Title VIII and Statute of Limitations Jurisprudence	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASE — Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 14, 18
Anderson v. *Zubieta*, 180 F.3d 329 (D.C. Cir. 1999) 9, 17
Anisman v. *O'Neill*, 2001 WL 402493 (EEOC Apr. 12, 2001) 10
Ashley v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164 (8th Cir. 1995) 17
Bazemore v. *Friday*, 478 U.S. 385 (1986) 13, 18
Beall v. *Abbott Labs.*, 130 F.3d 614 (4th Cir. 1997) 16
Bell v. *Chesapeake & Ohio Ry.*, 929 F.2d 220 (6th Cir. 1991) 16-17
Berry v. *Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983) 1, 9, 15, 16
Bosley v. *Merit Systems Protection Bd.*, 162 F.3d 665 (Fed. Cir. 1998) 16
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 8
Cardenas v. *Massey*, No. 00-5225, 2001 WL 1230325 (3d Cir. Oct. 16, 2001) 16
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 2, 7
Chickasaw Nation v. *United States*, 534 U.S. __ (2001) 6
Christensen v. *Harris Cty.*, 529 U.S. 576 (2000) .. 8
Crandon v. *United States*, 494 U.S. 152 (1990) 6
Curry v. *District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) 17
Delaware State Coll. v. *Ricks*, 449 U.S. 250 (1980) 12, 13
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 8

TABLE OF AUTHORITIES—Continued

Page

EEOC v. *Reynolds Metal Prods. Co.*, 530 F.2d 590 (4th Cir. 1976) 7
EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 19
Emerson Elec. Co. v. *Schlesinger*, 609 F.2d 898 (8th Cir. 1979) 7
Emmert v. *Runyon*, No. 98-2027, 1999 WL 253632 (4th Cir. Apr. 29, 1999) 16
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 19
Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) 14, 18, 19
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 4
Galloway v. *General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) ..... *passim*
Garcia v. *Danzig*, 2000 WL 270496 (EEOC Feb. 28, 2000) 9
General Elec. Co. v. *Gilbert*, 429 U.S. 125 (1976) 7, 8
General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997) 20
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 8
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) ... 7
1992) 17
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 3
Havens Realty Co. v. *Coleman*, 455 U.S. 363 (1982) 11, 12, 19, 20
Holmes v. *Reno*, 2000 WL 869821 (EEOC June 21, 2000) 9
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977) 6

TABLE OF AUTHORITIES—Continued

	Page
Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)	12
Kolstad v. *American Dental Ass'n*, 527 U.S. 533 (1999)	15
Local Lodge No. 1424 v. *NLRB*, 362 U.S. 411 (1960)	14
Lorance v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989)	3, 13, 14
Madison v. *IBP Inc.*, 257 F.3d 780 (8th Cir. 2001)	17
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	9
Martin v. *Nannie & the Newborns, Inc.*, 3 F.3d 1410 (10th Cir. 1993)	17
NLRB v. *Pennwoven, Inc.*, 194 F.2d 521 (3d Cir. 1952)	14
Order of Ry. Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944)	20
O'Rourke v. *City of Providence*, 235 F.3d 713 (1st Cir. 2000)	5, 16
Pollard v. *E.I. duPont de Nemours & Co.*, 532 U.S. 843 (2001)	11, 14, 15
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	4
Public Employees Ret. Sys. v. *Betts*, 492 U.S. 158 (1989)	8
Quarles v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968)	6
Richards v. *CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001)	1
Roberts v. *Gadsden Mem'l Hosp.*, 835 F.2d 793 (11th Cir. 1998)	17

TABLE OF AUTHORITIES—Continued

	Page
Rotella v. *Wood*, 528 U.S. 549 (2000)	15
Rush v. *Scott Specialty Gases*, 113 F.3d 476 (3d Cir. 1997)	16
Sabree v. *United Bhd. of Carpenters & Joiners, Local No. 33*, 921 F.2d 396 (1st Cir. 1990)	1, 9, 16
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	8
Taylor v. *FDIC*, 132 F.3d 753 (D.C. Cir. 1997)	17
TRW Inc. v. *Andrews*, 534 U.S. ___, 122 S. Ct. 441 (2001)	10, 17
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977)	*passim*
United States v. *Brockamp*, 519 U.S. 347 (1997)	10
United States v. *Kubrick*, 444 U.S. 111 (1979)	3, 19
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	7, 8
Varner v. *National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996)	17
West v. *Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1995)	16
Williams v. *Cheney*, 1992 WL 1374923 (EEOC August 25, 1992)	9
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)	1, 3, 10

CONSTITUTION, STATUTES, AND REGULATIONS

15 U.S.C. § 15b	14
29 U.S.C. § 160(b)	11
42 U.S.C. § 1981a	3
42 U.S.C. § 2000e-2	11
42 U.S.C. § 2000e-3(a)	18
42 U.S.C. § 2000e-5(e)(1)	5, 10, 14
42 U.S.C. § 2000e-5(g)	3, 4

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2000e-12(a)	2, 7, 8
42 U.S.C. § 2000e-16(b)	8
42 U.S.C. § 2000e-16(d)	8
42 U.S.C. § 3601 et seq	12
29 C.F.R. Part 1614	8, 9
64 Fed. Reg. 37,653 (1999)	9

MISCELLANEOUS

Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)	4
110 CONG. REC. 7243 (1964)	3
110 CONG. REC. 12,723 (1964)	3
117 CONG. REC. 31,973 (1971)	5
117 CONG. REC. 31,974 (1971)	5
117 CONG. REC. 31,981 (1971)	5
118 CONG. REC. 4940 (1972)	2
EEOC New Compliance Manual	7, 8, 9
Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1726, 92d Cong., 1st Sess. 476 (1971)	5
H.R. Rep. No. 92-238 (1971) (Minority Views on H.R. 1746)	6
Douglas Laycock, Continuing Violations, Disparate *Impact in Compensation, and Other Title VII Issues*, LAW & CONTEMP. PROBS., Autumn 1986 at 53	1, 5, 6
Management Directive 110, available at http://www.eeoc.gov/federal/md110.html	9

REPLY BRIEF FOR PETITIONER

Petitioner endorses a standard for application of the continuing violation doctrine – elucidated in *Galloway* v. *General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), and *Sabree* v. *United Bhd. of Carpenters & Joiners, Local No. 33*, 921 F.2d 396 (1st Cir. 1990) – that gives effect to all of the statutory provisions in Title VII, is consistent with this Court's well-developed jurisprudence on the application of statutes of limitations generally, and is consistent with Title VII's remedial purpose of eradicating discrimination.

By contrast, respondent and his amici offer a hodgepodge of proposed standards for applying the continuing violation doctrine.[1] Many of respondent's arguments depend on the premise that Section 706(e) is "an exhaustion requirement, not a statute of limitations." LDF Br. 7; Resp. Br. 15-17. That astonishing premise[2] requires respondent to ignore Section 706(e)'s explicit statutory language, its legislative history, and *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), which held that Section 706(e) is a statute of limitations.

By discarding Section 706(e), respondent attempts to use the statutory language and legislative history of Section 706(g), a provision that caps the amount of backpay a Title VII plaintiff

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[1] Compare Resp. Br. 36-39 and LDF Br. 19-23 (urging adoption of the standard set forth by the Ninth Circuit below and rejection of *Berry* v. *Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983)) with Impact Br. 19-28 (urging adoption of the standard adopted in *Richards* v. *CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001)) and Lwyrs. Com. Br. 17. In *Richards*, the California Supreme Court adopted the *Berry* standard, including the third factor – "permanence" – which asks whether the allegedly discriminatory acts had the "degree of permanence which would trigger an employee's awareness of and duty to assert his rights." 715 F.2d at 981.

[2] See Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, LAW & CONTEMP. PROBS., Autumn 1986, at 53, 56 ("A second source of confusion is the now rejected theory that the statute of limitations is not a statute of limitations at all * * *. I have always considered that argument frivolous.").

may recover *after proving liability*, to infer the existence of a continuing violation doctrine that protects plaintiffs who slept on their rights. Resp. Br. 17-24; LDF Br. 5-12; Lwyrs. Com. Br. 23-26. Respondent also ignores this Court's statute-of-limitations jurisprudence without ever explaining why Title VII's statute of limitations should be treated differently than every other statute of limitations considered by the Court.

Respondent and his amici next argue that the EEOC's conception of the continuing violation doctrine – a conception adopted very recently, not a consistent 30-year interpretation as respondent and amici claim – is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Resp. Br. 26-32; LDF Br. 13-19; Lwyrs. Com. Br. 20-22. The EEOC's conception of the continuing violation doctrine, however, is not entitled to *Chevron* deference because it involves a substantive issue – not a procedural one. See 42 U.S.C. § 2000e-12(a).

Respondent and his amici then argue that the accrual rule for a cause of action in any case involving a pattern of discrimination – defined as "related" allegedly discriminatory acts – should be different from the rule for cases involving a discrete act arising under Title VII and different from the rules applied by the Court in other cases. But the scant support respondent can find for that position in a single Fair Housing Act decision of this Court and a few Title VII decisions of lower courts is overwhelmed by contrary indications in the statutory language; this Court's Title VII jurisprudence; broader limitations jurisprudence including cases decided under the NLRA, on which Title VII's remedial provisions were modeled; the consensus of Title VII decisions in the lower courts; and Title VII policy.

I. SECTION 706(g)'s TWO-YEAR CAP ON RECOVERY OF BACKPAY IS NOT A REPUDIATION OF SECTION 706(e)'s LIMITATIONS PERIOD

Respondent and his amici make two interrelated assumptions in advancing the theory that Section 706(g), not Section 706(e), is controlling: first, that Section 706(e) is not a statute of limitations; and, second, that Section 706(g) is the only limitation on backpay liability. Both assumptions are wrong.

A. Section 706(e) Is A Statute of Limitations and Thus Limits The Amount Of Recoverable Damages

Section 706(e) is a statute of limitations – not a mere exhaustion requirement. *Zipes*, 455 U.S. at 394-395 & n.12. "Senator Humphrey * * * characterize[d] the time period for filing a claim as a 'period of limitations,' 110 Cong. Rec. 12723 (1964), and Senator Case described its purpose as preventing the pressing of 'stale' claims, *id.*, at 7243, the end served by a statute of limitations." 455 U.S. at 394; see also 118 CONG. REC. 4940 (1972) (remarks of Sen. Williams characterizing Section 706(e) as a "time limitation"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) ("as we noted in *Zipes*, both the language and legislative history of § 2000e-5(e) indicate that the filing period operated as a statute of limitations"); *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900, 910 (1989).

Respondent and his amici claim that Section 706(e) cannot be a limitations period because Section 706(g), 42 U.S.C. § 2000e-5(g), and 42 U.S.C. § 1981a (added in 1991) have different caps on the recovery of damages. Resp. Br. 17-25; Lwyrs. Com. Br. 22-26. Caps on liability found in accordance with other provisions of the statute say nothing about whether a plaintiff is entitled to bring an action in the first instance. "[S]tatutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose * * *." *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979). That Section 706(e), like other statutes of limitations, incidentally limits the recovery of damages hardly means that its interpretation must be tortured so that it becomes redundant with *other* provisions of the statute limiting damages.

In *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977), the Court distinguished a "remedy" issue from a "violation" issue. The Court contrasted the issue of the timeliness of Evans's charge with *Franks* v. *Bowman Transp. Co.*, 424 U.S.

747 (1976), in which the Court "dealt only with a question of remedy" because the "issues relating to the timeliness of the charge and the violation of Title VII had already been decided." 431 U.S. at 559; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244 n.10 (1989) (plurality opinion) (declining to read "Section 706(g) – a provision defining *remedies* – to influence the substantive commands of the statute").

In *Evans*, amicus LDF argued that Section 706(g) essentially supplanted Section 706(e)'s limitations period in cases involving an alleged continuing violation. The LDF argued that the two-year cap on backpay

> can have no meaning except in the context of a continuing violation, which has been occurring over a period far in excess of the 180-day time limit for the filing of a charge, prescribed by Section 706(e). Within that context it is clear that, although back pay liability is limited, the continuing violation of Title VII is itself an unlawful employment practice which is subject to challenge before the EEOC and in the co[illegible]

LDF *Evans* Br. 3-4. The dissent in *Evans* – the *only* part of *Evans* respondent cites (Resp. Br. 13) – adopted the LDF's argument. 431 U.S. at 561-62 (Marshall, J., dissenting). The majority, however, carefully distinguished Section 706(e)'s limitations period from the remedies provisions of Section 706(g) and (h). *Id.* at 558-560.

B. Section 706(g)'s Two-Year Cap on Backpay Is Not the Only Limitation On the Recovery of Damages Under Title VII

1. Respondent and his amici claim that Section 706(g) is the *only* limitation on the recovery of damages under Title VII. Resp. Br. 17-20; Lwyrs. Com. Br. 23-24. The statutory language does not support that conclusion. Section 706(g) provides, in part, "[b]ackpay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). Section 706(e)

provides that an administrative charge must be filed within 180 or 300 days of the allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). Neither provision states that the only limitation on the recovery of backpay is Section 706(g)'s cap.

Sections 706(e) and 706(g) can be read and applied to give effect to each provision without impinging on the other. See Laycock, *supra*, at 58. In cases of fraudulent concealment and estoppel, or hostile environment harassment cases involving continuing violations, Section 706(e)'s limitations period does not begin to run until the plaintiff knows or should have known of the violation. See, e.g., *Galloway*, 78 F.3d 1164; *O'Rourke* v. *City of Providence*, 235 F.3d 713 (1st Cir. 2000). In those cases, the two-year cap is the outside limit on backpay. This is exactly petitioner's interpretation of Sections 706(e) and 706(g).

2. Respondent and the LDF turn to Section 706(g)'s legislative history in an effort to find support for the position that the two-year cap is the only limitation on recovery of backpay. Resp. Br. 17-20; LDF Br. 5-12. Even if reference to the legislative history were necessary, no statement in Section 706(g)'s legislative history explicitly states that Section 706(g) is to be the only limitation on recovery of backpay. See LDF Br., App. A, The Legislative History of the Equal Employment Opportunity Act of 1972.

As the LDF notes, the two-year cap on backpay arose in response to "[t]he possibility of enormous monetary liability under Title VII, especially in view of the increased use of class-type suits, *regardless of the actual liability of the charged party*." LDF Br., App. A at 1 (citing Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1726, 92d Cong., 1st Sess. 476 (1971)) (emphasis added). Supporters of the two-year cap urged its adoption because the EEOC and some courts were not interpreting the charge-filing period as a limitation on recovery. See 117 CONG. REC. 31,973, 31,974, 31,981 (1971) (Rep. Erlenborn). Representative Erlenborn, the main proponent of the two-year cap on backpay, explained the rationale behind it:

> Testimony * * * established that the position of the EEOC is that remedies – including back pay – for discriminatory acts may reach back to the effective date of the Act. *It is not clear that courts have so held.* However, to preclude the *threat* of enormous back pay liability which could be utilized to coerce employers and labor organizations into surrendering their fundamental rights to a fair hearing or due process, my bill offers a new section * * * which limits liability to pattern and practice suits to a period of 2 years prior to the filing of a complaint with said court.
>
> With respect to individual complaints, therefore, back pay and other liability is limited to the statutory period for filing, formerly 90 days and extended under this bill to 180 days.

H.R. Rep. No. 92-238, at 65-66 (1971) (Minority Views on H.R. 1746) (emphasis added).

Thus, according to the architect of the two-year cap on backpay, it was included as a failsafe measure in case the courts accepted the argument that liability could extend back to the effective date of the Act. It was enacted "to make assurance doubly sure" that there was an outermost limit on liability. See *Crandon* v. *United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring in the judgment); see also *Chickasaw Nation* v. *United States*, 534 U.S. ___, ___, ___ (2001) (slip op. 4, 9-10).

Professor Laycock has suggested that Section 706(g)'s two-year limitation on the recovery of backpay was enacted in response to the continuing *effects* doctrine first articulated in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). That doctrine, which allowed plaintiffs to recover damages for any present effects of past discriminatory acts, was repudiated in *Evans*, 431 U.S. 553, and *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), decided on the same day. "The continuing effects theory that brought forth the amendment is now gone. The amendment is still with us, but it no longer makes sense." Laycock, *supra*, at 57.

Section 706(e) is a statute of limitations, and Section 706(g) serves as a cap on recovery of backpay in the rare instances in which the limitations period is extended for equitable reasons.

II. THE EEOC'S PRONOUNCEMENTS ON THE CONTINUING VIOLATION DOCTRINE ARE NOT ENTITLED TO DEFERENCE

Respondent and amici argue that the EEOC's interpretation of the continuing violation doctrine is entitled to *Chevron* deference. Resp. Br. 26-32; LDF Br. 13-19; Lwyrs. Com. Br. 20-22. But the EEOC has the authority under Title VII only "to issue, amend, or rescind *suitable procedural regulations*" for implementing Section 706. 42 U.S.C. § 2000e-12(a) (emphasis added).[3] "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). *Chevron* deference is given only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001).

Respondent and amici claim that *Chevron* deference should be given to the EEOC's interpretation contained in briefs (Resp. Br. 27 & n.13; LDF Br. 14-15; Lwyrs. Com. Br. 21) and in the EEOC Compliance Manual (Resp. Br. 27-28; Lwyrs. Com. Br. 21). Neither of those sources is entitled to *Chevron* deference. This Court has described the level of deference to an "interpretation advanced for the first time in a litigation brief" as "near

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[3] "[B]y restricting the [C]ommission to issuance of procedural rules, Congress intended to limit it to making rules for conducting *its* business, and to deny it the power to make substantive rules that create rights and obligations." *EEOC* v. *Reynolds Metal Prods. Co.*, 530 F.2d 590, 593 (4th Cir. 1976) (emphasis added); see also *Emerson Elec. Co.* v. *Schlesinger*, 609 F.2d 898, 902 (8th Cir. 1979); cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) (classifying statutes of limitations as "substantive" for *Erie* purposes).

indifference." *Mead*, 121 S. Ct. at 2172 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)). The EEOC's statement in its Compliance Manual also is not entitled to *Chevron* deference. *Mead*, 121 S. Ct. at 2175 ("'interpretations contained in policy statements, agency manuals, and enforcement guidelines,' * * * are beyond the *Chevron* pale") (quoting *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000)).[4]

The EEOC's interpretation receives deference "only to the extent that [this] interpretation[ ] has the 'power to persuade.'" *Christensen*, 529 U.S. at 587(quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). In applying that test, the Court has considered among other things whether the language of the statute supports the agency interpretation, and whether the interpretation has been maintained consistently. *Mead*, 121 S. Ct. at 2171 & n.8; *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991); *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 171 (1989); *Gilbert*, 429 U.S. at 410-11. Also, "[o]nce we have determined a statute's clear meaning" – as this Court's many Section 706(e) decisions have done – "we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

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[4] Although respondent and his amici also (Resp. Br. 28-32; LDF Br. 15-19) ask the Court to defer to EEOC regulations contained in 29 C.F.R. Pt. 1614 and to Management Directive 110, which implements those regulations, the regulations and the directive do not apply to private-sector cases. Congress's grant of authority to the EEOC under Section 717 to enforce Title VII with respect to federal employees is far broader than the limited authority given the EEOC in the context of non-federal employees. Compare 42 U.S.C. § 2000e-16(b) (the EEOC "shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section") with *id.* § 2000e-12(a) ("[t]he Commission shall have authority from time to time to issue, amend or rescind suitable procedural regulations to carry out the provisions of this subchapter"). In addition, Section 706(e)'s limitations period is not incorporated into Section 717. See 42 U.S.C. § 2000e-16(d) (explicitly providing that Section 706(g) through (k) applies in civil actions brought by federal employees).

Respondent and amici claim that petitioner is advocating a position at odds with the view taken by the EEOC for "three decades." LDF Br. 13; Resp. Br. 27-28; Lwyrs. Com. Br. 21. In fact, all three sources of the "official" EEOC position cited by respondent and his amici were promulgated more than thirty years *after* the enactment of Title VII.[5]

When Morgan filed his EEOC charge in 1995, the EEOC agreed with *petitioner's* position. In 1992, the Commission stated that, in determining whether an employee properly alleged a continuing violation, "an agency should consider whether a complainant had prior knowledge or suspicion of discrimination and the effect of this knowledge." *Williams* v. *Cheney*, 1992 WL 1374923, at *3 (EEOC August 25, 1992) (citing *Sabree*, 921 F.2d 396). Just last year, the Commission cited *Sabree* and *Berry* with approval. *Holmes* v. *Reno*, 2000 WL 869821, at *3 (EEOC June 21, 2000) (citing *Sabree*); *Garcia* v. *Danzig*, 2000 WL 270496, at *2 (EEOC Feb. 28, 2000) (citing *Berry*, 715 F.2d at 981, and *Sabree*). The EEOC recently *changed* its position partly *because of* the decision below:

> Prior to the revisions in the 29 C.F.R. Part 1614 regulations, the Commission cited the *Sabree* and the *Berry* decisions with approval in numerous decisions. However, the *Sabree* and *Berry* holdings are inconsistent with the Commission's goal of furthering the elimination of discriminatory employment practices by ending the fragmentation of unlawful employment practice claims in Federal sector cases. For this reason, * * * the Commission will follow the *Morgan* and *Anderson* [v. *Zubieta*, 180 F.3d 329 (D.C. Cir. 1999)] decisions, rather than the *Sabree* and *Berry* deci-

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[5] Management Directive 110 was issued on Nov. 9, 1999. See Management Directive 110, available at http://www.eeoc.gov/federal/md110.html. The new Compliance Manual including the section respondent cites was issued on May 12, 2000. The regulations relating to federal employees that respondent cites were promulgated in July 1999. 64 Fed. Reg. 37,653 (1999).

sions, when ruling on the timeliness of continuing violation claims under the revised 29 C.F.R. Part 1614 regulations.

Anisman v. *O'Neill*, 2000 WL 402493, at *5 (EEOC Apr. 12, 2001).

Section 706(e) provides that "[a] charge * * * *shall be filed* within one hundred and eighty days after the alleged unlawful employment practice occurred * * * *except that*" different time limits, generally 300 days, apply in deferral States. 42 U.S.C. § 2000e-5(e)(1) (emphasis added). By providing a general rule and a single exception, Section 706(e) has the same structure as the statute of limitations this Court construed recently in *TRW Inc.* v. *Andrews*, 534 U.S. ___, 122 S. Ct. 441 (2001). Citing *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997), the Court observed that an "'explicit listing of exceptions' to [the] running of [a] limitations period [is] considered indicative of Congress' intent to preclude 'courts [from] read[ing] other unmentioned, open-ended "equitable" exceptions into the statute.'" *TRW*, 122 S. Ct. at 447. General principles applicable to *every* statute of limitations may fairly be read into Section 706(e) unless negated by specific statutory language – as *Zipes* holds – and we have conceded that generally applicable principles of accrual and equitable tolling may benefit certain Title VII plaintiffs. Pet. Br. 30-37. But the EEOC's *Title VII-specific* "continuing violation doctrine" finds no support in the statutory language and – as respondent concedes (Resp. Br. 32-35) – would require the Court to depart from "continuing violation" cases decided under other statutes.

Nor can the EEOC's version of the continuing violation doctrine be teased out of the single statutory phrase "alleged unlawful employment practice occurred." Citing only dictionary definitions of the single word "practice," respondent tries to distinguish an "unlawful employment practice," which he says means repeated or customary actions, from the discrete acts that ordinarily start the running of statutes of limitations. Resp. Br. 26. But see Pet. Br. 14-22 (citing Title VII decisions of this Court starting the running of the statute of limitations at the time

of a discrete unlawful act). "However, we must not analyze one term of" Section 706(e) "in isolation." *Pollard* v. *E.I. duPont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946, 1951 (2001). "Unlawful employment practice" means simply the acts made unlawful by Section 703, 42 U.S.C. § 2000e-2, which is captioned "unlawful employment practices" and which describes numerous discrete acts made unlawful by the statute. Moreover, the phrase "unlawful employment practice" is based on the NLRA's limitations provision, which requires that a charge be filed within six months of an "unfair labor practice." 29 U.S.C. § 160(b). As discussed in petitioner's opening brief (at 23-25) and further below, at the time Congress modeled Title VII's remedial provisions on the NLRA, case law under the NLRA was clear that the continuing violation doctrine did not apply to extend the limitations period for discrete events simply because there was more than one allegedly unfair labor practice at issue.

III. THE "NOTICE" LIMITATION ON THE CONTINUING VIOLATION DOCTRINE IS APPROPRIATE

A. Cases Involving "Patterns" of Discrimination Are Not Subject to Any Special Rule

1. Respondent and his amici concede that the continuing violation doctrine has no role in cases involving discrete acts of discrimination. Resp. Br. 14; LDF Br. 22; Lwyrs. Com. Br. 7-12; Impact Br. 19. They argue, however, that the continuing violation doctrine should allow the plaintiff to recover for acts outside the limitations period whenever "a series of discriminatory acts * * * are so related as to be fairly regarded as a continuing" pattern regardless of whether this "pattern" comprises separate individual discrete acts each of which triggered its own limitations period. Lwyrs. Com. Br. 8-12; Resp. Br. 11-15, 36-39: LDF Br. 19-23; Impact Br. 16-19.

In support of that proposition, they rely on *Havens Realty Co.* v. *Coleman*, 455 U.S. 363 (1982), a case involving the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. Resp. Br. 11-15; LDF Br. 20-21; Lwyrs. Com. Br. 7-12. The *holding* in *Havens* is of

no assistance to respondent, for two independent reasons. See Pet. Br. 30 n.8; U.S. Br. 18-19. As petitioner explained, it was only persons who brought "neighborhood" claims, complaining of "steering of persons other than the plaintiff" (455 U.S. at 375), whom the Court allowed to rely on a "continuing violation" theory. A Title VII plaintiff complaining of discriminatory acts directed against *him* has no comparable claims. And, as the Solicitor General explained, the Court rejected only petitioners' argument that plaintiffs' claims were *barred altogether*; a contingent settlement (*id.* at 371) made it unnecessary for the Court to address the scope of *relief*. Respondent and his amici have chosen not to respond to those arguments, but instead to rely on the *language* of the opinion: "whenever a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Id.* at 380-81. But "[i]t is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994).

Havens was not a Title VII case, and this Court neither cited Title VII statute-of-limitations precedents in *Havens* nor has cited *Havens* in later Title VII cases. See Pet. Br. 30 n.8. And this Court's Title VII cases simply do not admit of a doctrine that excuses plaintiffs who have, and know that they have, accrued causes of action from making timely EEOC charges. This Court first articulated the Title VII accrual rule in *Evans*, 431 U.S. at 558 ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."). It requires that a plaintiff file a claim as soon as he knew or should have known that he was discriminated against. See Pet. Br. 14-22.

In *Delaware State Coll.* v. *Ricks*, 449 U.S. 250 (1980), the plaintiff "claim[ed] a 'continuing violation' of the civil rights laws" (*id.* at 257) and alleged various non-time-barred "unusual incidents" in his complaint (*id.* at 257 n.8), but the Court did not

identify a "pattern" and allow the timely incidents to bring the untimely incidents in. Rather, the Court was impressed with counsel's concession that the timely "incidents * * * were not *independent* acts of discrimination" (*ibid.* (emphasis added)). The concession that the Court treated as *fatal* to Ricks's claim is the very affirmative contention of relatedness that respondent claims should *save* him. Furthermore, the Court thought it important that "there can be no claim here that Ricks was not abundantly forewarned" of the need to file an EEOC charge. *Id.* at 262 n.16. By contrast, respondent decries any inquiry into the plaintiff's notice as "totally inapposite to appropriate Title VII jurisprudence." Resp. Br. 43; see also LDF Br. 20-23.

In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court held that the defendants violated Title VII because they failed to eradicate all vestiges of a pre-Act discriminatory salary structure. The Court, however, did not apply the continuing violation doctrine to save all otherwise time-barred claims. Rather, it held that Title VII was violated by the issuance of each week's paycheck, and an actionable wrong accrued with the delivery of every paycheck. *Id.* at 395. *Bazemore* was a "pattern" case if ever there was one, but the Court did not adopt a different accrual or limitations rule for these types of claims.

Likewise in *Lorance*, a case involving an allegedly discriminatory seniority system, the Court declined to adopt a more lenient accrual rule or to extend the limitations period. 490 U.S. at 904-05. Rather, it held that the employees' claims were time barred because they failed to file charges within 300 days of the adoption of the allegedly discriminatory seniority system. *Id.* at 905-06. Respondent has offered no reason why his "pattern" case, cobbled together from widely different incidents perpetrated by a number of different people, should be treated differently from the patterns in *Bazemore* and *Lorance*.[6]

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[6] The allegedly discriminatory acts in this case ranged in nature and severity – from failure to pay respondent when he served on jury duty to suspension and termination. Pet. App. 26a-37a. Therefore, unlike the

2. Respondent and amici wish to import Fair Housing Act jurisprudence into this Title VII case but want no part of the case law from other areas of the law that undermines their position. Resp. Br. 32-35; Lwyrs. Com. Br. 19-20. They make a half-hearted attempt to distinguish the NLRA cases that apply the continuing violation doctrine. Resp. Br. 34-35; Lwyrs. Com. Br. 19-20. The NLRA, however, was the model for Title VII's remedial provisions – including Section 706(e). *Lorance*, 490 U.S. at 909. Cases interpreting the NLRA are persuasive in construing Title VII. *Ibid.*; *Pollard*, 121 S. Ct. at 1949-50; *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 226 n.8 (1982); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-20 (1975). "Such reliance is particularly appropriate" here because "[t]he NLRA's statute of limitations * * * is even substantively similar to § 706(e)." *Lorance*, 490 U.S. at 909-10. Contrary to respondent's contention, the courts and the NLRB had grappled with Section 10(b)'s limitations period and its effect on continuing acts long before 1964. See, *e.g.*, *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 417 n.6, 422 n.13 (1960); Pet. Br. 23-24. Even if a continuing violation was found, remedies such as backpay were unavailable to remedy related violations before the charge-filing period. *NLRB* v. *Pennwoven, Inc.*, 194 F.2d 521, 525 (3d Cir. 1952); see generally U.S. Br. 14-15.

Respondent and the Lawyers' Committee argue that no general accrual rule can be gleaned from Clayton Act and civil RICO cases because the language of the Clayton Act statute of limitations (applied also in RICO cases, see Resp. Br. 32 & n.20) provides that any action is barred unless "commenced within four years after the cause of action accrued." Resp. Br. 32-34 (citing 15 U.S.C. § 15b). But the distinction cuts the other way: a statute that refers to an "accru[al]" gives courts

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"steering" situation in *Havens Realty*, this case does not involve identical acts manifesting an underlying policy of discrimination. A single supervisor did not perpetrate the allegedly discriminatory acts. Rather, respondent claims that at least five different supervisors at different times spanning five years were involved in the allegedly discriminatory acts. *Ibid.*

more leeway to chart their own path for accrual rules than Section 706(e), which requires that a charge be filed within a specified number of days from a specified "occurr[ence]."

The Lawyers' Committee argues that the antitrust and civil RICO cases are distinguishable because, unlike Title VII, the statutes at issue in those cases "provide for recoveries spanning remarkable periods of time" and provide for treble damages. Lwyrs. Com. Br. 19. But in Title VII cases, no less than in antitrust and RICO cases, there is an incentive to delay in filing suit to profit from the accumulation of damages. Title VII plaintiffs are able to recover both compensatory and punitive damages. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533 (1999). Moreover, although there are caps on damages, the two-year backpay cap runs from two years before the date on which the charge was filed. Respondent filed his charge in February 1995, so his right to recover backpay if he should prevail on the merits starts nearly nine years ago. He also could be eligible for front pay not subject to any cap. *Pollard*, 121 S. Ct. at 1950.

Finally, respondent claims that the Ninth Circuit's approach has support in criminal law, where ongoing conspiracy, larceny, and embezzlement are subject to a broad continuing violation doctrine. Resp. Br. 35. That analogy has even less force in Title VII cases than in civil RICO cases, where any rule less stringent than a discovery accrual rule "would patently disserve the congressional objective of a civil enforcement scheme * * * aimed at rewarding the swift who undertake litigation in the public good." *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000).

B. The Notice Limitation On the Continuing Violation Doctrine Comports With Title VII and Statute-of-Limitations Jurisprudence

1. There is an extremely broad consensus in the lower courts that notice plays an important role in Section 706(e) cases, but respondent and his amici both deny and fight the consensus. The Lawyers' Committee et al. criticize *Berry* by claiming that it can be "misread" to imply a "notice" limitation on the

continuing violation doctrine (Lwyrs. Com. Br. 17); characterize *Galloway* as "inadequate and aberrational"(*id.* at 16); and reserve perhaps their harshest words for *Sabree* (an opinion joined by then-Judge Breyer), which is said to have "create[d] from whole cloth an 'inquiry notice' rule that represents a bar to continuing violations that has no basis in § 706(e)" (*id.* at 15 n.4). They and respondent also argue that other courts of appeals have applied the continuing violation doctrine using an approach similar to the Ninth Circuit's "sufficiently related" standard. *Id.* at 11-12; Resp. Br. 36-37. But their summary of the case law in the lower courts is not accurate (see *O'Rourke*, 235 F.3d at 731 n.6), and their criticisms of the *Galloway/Sabree* and *Berry* tests are off the mark.

The *Galloway/Sabree* standard is used by the Federal Circuit, *Bosley* v. *Merit Systems Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998), and has been cited with approval by the Fourth. *Emmert* v. *Runyon*, No. 98-2027, 1999 WL 253632, at *4 (4th Cir. Apr. 29, 1999).[7] The *Berry* standard is applied in the Third, Sixth, Tenth, and Eleventh Circuits. *West* v. *Philadelphia Elec. Co.*, 45 F.3d 744, 755 & n.9 (3d Cir. 1995);[8] *Bell* v. *Chesapeake & Ohio Ry.*, 929 F.2d 220, 223-25 (6th Cir. 1991); *Martin* v. *Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1415 & n.6 (10th Cir. 1993); *Roberts* v. *Gadsden Mem'l Hosp.*, 835 F.2d 793, 801 (11th Cir. 1998). The scattered cases that are consistent with the *Morgan* standard are contradicted by other cases in the same courts.[9]

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[7] The Fourth Circuit did not, as respondent claims, adopt a standard akin to the Ninth Circuit's in *Beall* v. *Abbott Labs.*, 130 F.3d 614 (4th Cir. 1997). In *Beall*, the court denied recovery for a hostile environment sexual harassment claim because no violation had occurred within the limitations period and thus all claims were time barred. To say that a violation within the limitations period is *necessary* for a plaintiff to recover is not to say that such a violation is *sufficient* to allow recovery for acts outside the limitations period.

[8] Respondent claims that *West* and other Third Circuit cases exemplify a standard akin to the Ninth Circuit's standard. But both *West* and *Rush* v. *Scott Specialty Gases*, 113 F.3d 476 (3d Cir. 1997), use the Fifth Circuit's *Berry* standard. Likewise, *Cardenas* v. *Massey*, No. 00-5225, 2001 WL 1230325 (3d Cir. Oct. 16, 2001), does not apply a liberal continuing violation standard in line with the Ninth Circuit. Rather, *Cardenas* is a *Bazemore*-type case in which the court of appeals reversed a district court decision holding that *all* of plaintiff's claims were time-barred because the plaintiff did not file suit at the time of the first discriminatory paycheck.

Respondent and amici argue that limiting reliance on the continuing violation doctrine would cause victims in hostile environment cases to "run the real risk of being both too early and too late." Impact Br. 11; Resp. Br. 39-43. But the Seventh Circuit was concerned with precisely that issue. *Galloway*, 78 F.3d at 1166. The court recognized that a plaintiff should not be forced to file suit prematurely. Rather, if the plaintiff filed her charge "as soon as harassment becomes sufficiently palpable that a reasonable person would realize that she had a substantial claim under Title VII," she would be able to rely on the continuing violation doctrine to encompass the entire course of discriminatory conduct. *Ibid.* The plaintiff in *Galloway* was permitted to rely on the continuing violation doctrine to save otherwise time-barred claims because the court held that the behavior at issue was "just the kind of verbal conduct that it would *not* be reasonable to expect an employee to base suit on the first time it occurred." *Id.* at 1167. The *Galloway* approach is consistent with the rule that "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *TRW*, 122 S. Ct. at 450 n.6.

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[9] Compare *Anderson* v. *Zubieta*, 180 F.3d at 337, with *Curry* v. *District of Columbia*, 195 F.3d 654, 661 n.4 (D.C. Cir. 1999), and *Taylor* v. *FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997); compare *Varner* v. *National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996), with *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc), and *Madison* v. *IBP Inc.*, 257 F.3d 780, 796-97 (8th Cir. 2001) ("[i]n the Eighth Circuit, plaintiffs may only recover damages on their federal employment discrimination claims for acts committed during the statute of limitations period, even if there is a continuing violation"); compare *Haithcock* v. *Frank*, 958 F.2d 671, 677-79 (6th Cir. 1992), with *Bell*, 929 U.S. at 223-25.

2. Respondent and his amici offer a smorgasbord of policy reasons purportedly supporting the rule adopted by the Ninth Circuit. All are unpersuasive.

The Impact Fund et al. claim that victims of sexual harassment should not be subject to a notice limitation on the continuing violation doctrine because they are often very distressed by the harassment and fear retaliation. Impact Br. 8-11. Congress has dealt with that threat by enacting an anti-retaliation provision in Title VII. 42 U.S.C. § 2000e-3(a). If amici believe that existing protections against retaliation are insufficient, they should seek new protections from Congress, not a textually ungrounded judicial extension of the statute of limitations.

The Impact Fund et al. also claim that a notice limitation on the continuing violation doctrine would not be appropriate in disability cases because an employee might inadvertently lose her right to proceed with a claim against her employer for failing to engage in the interactive process if the employee did not file her charge within 180 days of her first request for accommodation. Impact Br. 12-16. But nothing about petitioner's argument in this case bears at all on the entitlement of an employee to forward-looking injunctive relief. See *Galloway*, 78 F.3d at 1167 (the victim "can always seek injunctive relief against a continuation of the unlawful conduct"). The claim that "the employee demonstrated awareness of his legal rights and should be barred from assertion that he was entitled to that accommodation" (Impact Br. 14) is no more valid – and no more representative of petitioner's position – than the arguments rejected in *Bazemore* and the antitrust cases. See Pet. Br. 20-21.

Respondent and the LDF argue that a notice limitation on the continuing violation doctrine is inconsistent with Title VII's "make-whole" purpose. Resp. Br. 43-45; LDF Br. 21-23. Title VII's primary purpose, however, is to eradicate discrimination. *Albemarle*, 422 U.S. at 417; *Ford Motor Co.*, 458 U.S. at 227, 230. Compensation to victims of discrimination is "Title VII's secondary, fallback purpose." *Ibid.* The notice limitation on the continuing violation doctrine furthers Title VII's primary purpose by encouraging the prompt filing of claims.

The Lawyers' Committee et al. argue that the standard proposed by petitioner will result in "multiple premature" lawsuits (Lwyrs. Com. Br. 29-30) and the Impact Fund et al. claim it will result in "confrontation and controversy" (Impact Br. 14). Those assumptions might be accurate if the employee were required to *file a lawsuit* within 300 days after the allegedly discriminatory act occurred, but the employee is required to *file an administrative charge* with an agency that is charged with investigating *and conciliating* charges of discrimination. By requiring an employee to file an administrative charge before proceeding to court, Congress sought to promote conciliation and voluntary compliance, *not* litigation. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 77 (1984); *Ford Motor Co.*, 458 U.S. at 227.

The LDF errs in its naked policy argument that a notice limitation on the continuing violation doctrine unfairly places the burden of ending discrimination on the employee. LDF Br. 23. The undeniable statutory requirement that the employee file a charge *at all*, not any particular construction of the continuing violation doctrine, assigns some responsibility for the eradication of discrimination to the employee. Calling the employer a "wrongdoer" (*ibid.*) no more helps to resolve this than any other statute-of-limitations case. See *Kubrick*, 444 U.S. at 125. And the idea that the employee must take steps to mitigate harm before the employer will be saddled with liability is nothing new. In *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998), the Court discussed the "policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages'" (quoting *Ford Motor Co.*, 458 U.S. at 231 n.15). "[N]o award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* at 807.

Finally, relying on dicta from *Havens Realty*, respondent and amici assert that so long as there is a continuing violation – a series of related allegedly discriminatory acts possibly stretch-

ing back to time immemorial – there is no issue of staleness of claims. LDF Br. 3, 22; Impact Br. 28; *Havens Realty*, 455 U.S. at 380 ("[w]here the challenged violation is a continuing one, the staleness concern disappears"). Outside the context of "neighborhood" steering claims, that simply is not true. Concerns about staleness of claims increase with every passing day, whether or not a continuing violation exists. For example, respondent seeks to recover for acts occurring over a five-year period involving at least five managers and numerous other potential witnesses. During that five-year period, the "memories of witnesses faded and [some potential] witnesses have disappeared." *Order of Ry. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). These problems are compounded the longer the violation is permitted to continue.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.[10]

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[10] Respondent argues that he is entitled to a new trial because of evidentiary issues raised but not decided on the appeal below. Resp. Br. 45-50. Those issues are not before this Court but may of course be raised on remand. However, contrary to respondent's assertion, the district court did permit him to present evidence of time-barred acts as it related to him. Pet. App. 40a n.9. Respondent argues that the district court unfairly restricted him because it refused to allow him or his witnesses to refer to pre-limitations period conduct as discrimination. Given that the ultimate legal question in the case was whether there was evidence of discrimination, it was reasonable for the court to conclude that respondent's and his witnesses' use of the word "discrimination" might unduly prejudice the jury. The court did permit testimony about the allegedly discriminatory acts minus respondent's editorial comments. Evidentiary issues are reviewed for abuse of discretion. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141-42 (1997).

Respectfully submitted,

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NATIONAL RAILROAD PASSENGER CORPORATION,
PETITIONER

v.

ABNER MORGAN, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a plaintiff may recover under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for unlawful employment practices that are outside the statutory charge-filing period, if the practices were "sufficiently related" to unlawful practices that occurred within the period.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument:	
A Title VII claimant may recover for a violation that occurred within the charge-filing period despite earlier notice of the unlawful employment practice, but may not recover for a violation that occurred outside the charge-filing period	11
A. Title VII violations that continue into the charge-filing period remain actionable despite the claimant's prior notice of the violation	11
B. Neither caps on back pay nor damages provisions demonstrate that Congress intended to allow recovery for unlawful practices that occurred outside the charge-filing period	22
C. Respondent may not recover for discrimination that occurred outside the 300-day charge-filing period	26
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987)	12
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	13, 19
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)	26
Anderson v. *Reno*, 190 F.3d 930 (9th Cir. 1999)	7
Anisman v. *O'Neill*, Appeal No. 01994634, 2001 WL 402493 (EEOC Apr. 12, 2001)	23
Baldwin County Welcome Ctr. v. *Brown*, 446 U.S. 147 (1984)	21
Bazemore v. *Friday*, 478 U.S. 385 (1986)	17

Cases—Continued: Page

Berry v. *Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983) 8, 22-23
Bowen Prods. Corp., 113 N.L.R.B. 731 (1955) 15
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) 19
Cada v. *Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) 21, 22
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42 U.S.C. 2000e-6 (§ 707) 2, 10, 23, 24, 25
42 U.S.C. 2000e-6 note 2
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§ 102, 105 Stat. 1072-1074 (42 U.S.C. 1981a) 1, 10, 25
§ 112, 105 Stat. 1078-1079 (42 U.S.C. 2000e-5(e)(2)) 18
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Fair Housing Act, 42 U.S.C. 3604 18
National Labor Relations Act, ch. 372, § 10(b), 49 Stat. 453-454 (29 U.S.C. 160(b)) 9, 13, 14, 16
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In the Supreme Court of the United States

No. 00-1614

NATIONAL RAILROAD PASSENGER CORPORATION,
PETITIONER

v.

ABNER MORGAN, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, and authorizes equitable remedies against both public and private employers that discriminate. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. 1931a), authorizes, in cases of intentional discrimination, the additional remedies of compensatory damages and (in suits against private employers) punitive damages. The Attorney General of the United States shares responsibility for enforcing Title VII with the Equal Employment Opportunity Commission (EEOC). See

42 U.S.C. 2000e-5(f), 2000e-6 & note. In addition, Title VII applies to the federal government in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16 (1994 & Supp. V 1999).

This case concerns the timeliness of charges filed with the EEOC pursuant to Title VII. Petitioner challenges the court of appeals' holding that a Title VII claimant who alleges an unlawful employment practice that continued into the charge-filing period may recover even for violations that otherwise would be time-barred. The resolution of that issue will directly affect the government's responsibilities for enforcing Title VII against private-sector and state and municipal employers, and implicates the remedies that may be awarded against the federal government as a Title VII defendant.

STATEMENT

1. Section 706(e) of Title VII provides that an employment discrimination charge may be filed with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." When there is a state fair employment practice agency with overlapping jurisdiction (as is the case in most States), however, a charge may be filed with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). If a complainant submits a charge of discrimination to the EEOC based on employment practices that occurred in such a State, the 300-day filing period applies and the EEOC refers the discrimination charge to the appropriate state or local agency for processing. See 29 C.F.R. 1601.13. In *Zipes* v. *TWA*, 455 U.S. 385 (1982), this Court held that Section 706(e)'s requirement of filing a timely charge of discrimination with the EEOC operates as a statute of limitations. *Id.* at 392-398.

2. In August 1990, petitioner hired respondent, an African-American male, as an electrician's helper at petitioner's Oakland Maintenance Yard. Pet. App. 6a-7a, 26a. Respondent alleged that petitioner hired similarly qualified and less-qualified white workers as electricians at a higher rate of pay. *Id.* at 7a, 26a-27a; see 8/4/98 Pl.'s Opp'n to Mot. for Summ. J. 1.[1] Respondent filed a union grievance, and he was reclassified as an electrician in April 1992. Pet. App. 26a.

Respondent alleged that petitioner "continuously discriminated against [him] during the entire time that he worked for [respondent] in violation of Title VII." Compl. para. 7. Specifically, respondent claimed that in March 1991 he was discriminatorily disciplined and ultimately lost ten days of pay after he refused to attend a meeting with a supervisor without having a union representative present. Pet. App. 7a, 27a-28a. Respondent also asserted that in August 1991 he was denied an equal opportunity to be considered for admission to petitioner's apprenticeship program for employees seeking to become electricians. *Id.* at 7a-8a, 28a. On October 4, 1991, respondent sent a letter complaining of race discrimination to petitioner's Equal Employment Opportunity (EEO) office. *Id.* at 8a, 28a. On October 16, 1991, respondent received written counseling for ignoring a direct order to stop helping a co-worker. *Ibid.* Respondent protested the counseling as racially motivated. *Ibid.*

In late 1991, respondent and other employees met with their congressional representative to complain about discrimination at the Oakland Maintenance Yard. Pet. App. 8a.

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[1] The court of appeals in this case reversed the district court's grant of partial summary judgment in favor of petitioner. See Pet. 6a, 21a. Accordingly, "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to [respondent]." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Shortly thereafter, respondent received counseling for being argumentative and threatening. *Ibid.*

On September 17, 1992, respondent received counseling about absenteeism from Robert Vandenberg (the senior manager at the Oakland yard) and from another superior. Respondent asserted that some of the leave in question had been approved in advance. Pet. App. 8a, 28a; 8/4/98 Pl.'s Opp'n to Mot. for Summ. J. 3. In September and November 1992 respondent was ordered to do clean-up work that was outside his job description. On December 1, 1992, respondent received written counseling for failing to fulfill the November assignment. Pet. App. 9a, 29a.

On May 21, 1993, respondent asked Vandenberg why his name had been removed from a list of employees scheduled for training. Vandenberg allegedly responded that respondent lacked the mental capacity for the training. Pet. App. 29a. On May 25, 1993, respondent filed a complaint with petitioner's EEO office alleging racial discrimination and retaliation. On May 30, 1993, respondent filed another complaint with the EEO office. *Id.* at 9a-10a, 29a-30a.

On July 14, 1993, petitioner suspended respondent for 15 days for taking a day of leave without permission in May. After respondent filed a complaint with the EEO office and a grievance with his union, however, he was awarded back pay and the suspension was ordered expunged from his record. Pet. App. 9a, 29a-30a.

In October 1993, respondent was charged with making improper remarks to a union representative. The charges were dropped after a hearing and the incident was ordered expunged from respondent's file. Pet. App. 10a, 30a. Respondent offered testimony that Vandenberg had asked another employee to lie about the incident to support punishment of respondent, saying that respondent was "going to be fired anyway[]." *Id.* at 31a. Also in October 1993, respondent accused Vandenberg of pushing him. Respondent filed a

complaint with petitioner's EEO office based on that incident but he did not receive a response. *Id.* at 10a, 31a.

In December 1993, respondent's scheduled training was canceled. Respondent complained to the EEO office about the cancellation but he again received no response. Pet. App. 11a, 31a.

In January 1994, respondent had a dispute with his supervisors about returning from sick leave. After respondent filed a grievance, petitioner paid him for three days of work that he lost as a result of the dispute. Pet. App. 11a, 31a-32a.

On September 9, 1994, respondent was charged with a violation of work rules for failing to complete a work assignment. After a hearing, respondent was suspended for 15 days. Respondent alleged that petitioner did not discipline a white electrician who failed to finish a similar assignment given at the same time, and that his own suspension violated petitioner's disciplinary policy. Pet. App. 11a, 32a-33a. In October 1994, respondent was again denied training, again complained to petitioner's EEO office, and again received no response. *Id.* at 11a, 35a.

On February 5, 1995, a foreman reported that respondent threatened him. Respondent alleged that a supervisor then told him to get his "black ass" into the supervisor's office. Respondent refused to discuss the matter with the supervisor without a union representative and left work. After a hearing, respondent was terminated from his job because of that incident. Pet. App. 11a-12a, 33a-34a.

In addition to the specific incidents discussed above, respondent alleged that employees and supervisors at the Oakland facility made racial jokes and derogatory comments and directed racial slurs and epithets at African-Americans. Pet. App. 12a.

3. On February 27, 1995—before the hearing that resulted in termination of respondent's employment—respondent filed charges against petitioner with the EEOC,

alleging discrimination and retaliation. Respondent also filed charges with the California Department of Fair Employment and Housing. Pet. App. 13a, 36a-37a. On July 3, 1996, the EEOC issued respondent a notice of right to sue. On October 2, 1996, respondent filed suit in the United States District Court for the Northern District of California. *Id.* at 13a, 37a; see generally 42 U.S.C. 2000e-5(f). In his complaint, respondent sought compensatory and punitive damages, reinstatement, back pay, front pay, expungement of records from his file, and attorney's fees. Compl. 4-5.

The district court granted in part and denied in part petitioner's motion for summary judgment. Pet. App. 25a-52a. The district court held that, under Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), respondent could not recover for conduct that occurred before May 3, 1994 (300 days before February 27, 1995, when respondent filed his charge with the EEOC). Pet. App. 38a-40a, 51a-52a. The district court found that respondent "believed as early as 1991 that [petitioner] and its managers were discriminating against him on the basis of his race and retaliating against him for his complaints," and that throughout 1992, 1993, and 1994, respondent complained of discrimination and retaliation. *Id.* at 39a-40a. The district court also invoked *Galloway* v. *General Motors Service Parts Operations*, 78 F.3d 1164 (1996), in which the Seventh Circuit held that a Title VII plaintiff may not recover for conduct that occurred outside the charge-filing period unless "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable * * * only in the light of events that occurred later, within the period of the statute of limitations." *Id.* at 1167. Based on its factual findings and the reasoning of *Galloway*, the district court concluded that respondent's claims for the period before May 3, 1994, were time-barred because respondent's awareness of

the alleged violations "triggered * * * [a] duty to assert his rights." Pet. App. 38a-39a. The court emphasized, however, that its ruling only precluded respondent from recovering for acts before the limitations period. It did not entirely preclude respondent's suit and respondent could "present[] evidence of acts that occurred prior to the limitations period if they are relevant to his timely claims of discrimination and retaliation." *Id.* at 40a-41a n.9.

The district court then rejected respondent's allegations which, although timely, were not embraced within respondent's EEOC charges. Pet. App. 41a-44a. The district court dismissed other timely claims because respondent failed to present facts that would support them. *Id.* at 49a-51a. But the district court allowed respondent to proceed to trial on claims relating to his September 1994 suspension for failing to complete a work assignment, the October 1994 cancellation of training, and the February 1995 discharge. *Id.* at 44a-49a, 52a. The jury returned a verdict for petitioner on each of those claims. *Id.* at 13a.

4. The court of appeals reversed and remanded for a new trial because it concluded the "pre-limitations period conduct should have been presented to the jury not merely as background information, but also for purposes [of] liability." Pet. App. 21a.

The court of appeals rested its decision on the continuing violation doctrine, which, it said, "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" Pet. App. 14a (quoting *Anderson* v. *Reno*, 190 F.3d 930, 936 (9th Cir. 1999)). The court of appeals rejected (*id.* at 14a-15a) the district court's reliance on *Galloway*, stating that the Seventh Circuit's approach was inconsistent with Ninth Circuit cases that rejected "a strict notice requirement as the litmus test for application of the continuing violation doctrine." *Id.* at 15a; see *Fielder* v. *UAL*

Corp., 218 F.3d 973, 987 n.10 (9th Cir. 2000), petition for cert. pending, No. 00-1397 (filed Mar. 7, 2001).

The court of appeals also rejected (Pet. App. 15a) the approach to the continuing violation doctrine developed by the Fifth Circuit in *Berry* v. *Board of Supervisors of L.S.U.*, 715 F.2d 971 (1983), which several other circuits have followed, see *O'Rourke* v. *City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001) (citing cases). In *Berry*, the Fifth Circuit identified factors that it deemed relevant to whether a Title VII plaintiff may recover for an occurrence outside the limitations period by virtue of its relationship to occurrences within the limitations period. One factor, "perhaps of most importance," is whether the acts that occurred prior to the limitations period had a "degree of permanence" that should have put the plaintiff on notice of his claim. 715 F.2d at 981. The court of appeals in this case rejected consideration of that factor. In the Ninth Circuit, the court stated, the continuing violation doctrine applies "[e]ven though * * * a reasonable person would have been on notice" before the limitations period "that her rights were violated." Pet. App. 15a.

The court of appeals concluded that the alleged violations of Title VII before May 3, 1994, were actionable because they were "sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine." Pet. App. 18a-21a. In addition, the court of appeals vacated the jury's verdict in favor of petitioner on claims within the limitations period. *Ibid.* The court suggested (*id.* at 21a-22a) that the jury's verdict might have been tainted by evidentiary rulings that arose from the district court's exclusion of claims outside the limitations period. Accordingly, the court of appeals remanded for a new trial encompassing alleged violations both before and after the May 3, 1994, limitations date.

SUMMARY OF ARGUMENT

1. As applied in antitrust, torts, and contracts, the continuing violation doctrine allows a plaintiff to recover for a violation that occurs within the limitations period even if he knew or should have known of the defendant's illegal course of conduct much earlier. There must, however, be an actionable violation within the limitations period, and the plaintiff may not recover for violations, even related ones, that occurred outside the limitations period.

The plain language of Section 706(e)—which directs Title VII claimants to file their charges with the EEOC within either 180 days or 300 days "after the alleged unlawful employment practice occurred," 42 U.S.C. 2000e-5(e)(1)—accords with the traditional continuing violation doctrine. That doctrine, moreover, has been applied under Section 10(b) of the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 453-454 (29 U.S.C. 160(b)), which Congress used as its model for Title VII's remedial provisions. And that doctrine is consistent with this Court's decisions applying Section 706(e), which allow recovery for discrimination that occurs within the charge-filing period despite earlier notice of the allegedly unlawful practice, but do not allow recovery for violations that occurred outside the charge-filing period.

The traditional rule furthers the remedial purposes underlying Title VII and balances the interests of Title VII plaintiffs and defendants. Employers always have an incentive to comply with Title VII, because their ongoing violations remain actionable. Prohibiting recovery on pre-limitations claims, however, encourages potential plaintiffs to bring their claims promptly and protects employers against having to defend against stale claims.

2. Nothing in Title VII is inconsistent with the traditional continuing violation doctrine. Section 706(g), which provides that "[b]ack pay liability shall not accrue from a

date more than two years prior to the filing of a charge with the Commission," 42 U.S.C. 2000e-5(g)(1), sets an outer limit on back pay but does not prohibit application of a limitations period of less than two years. The legislative history of Section 706(g) does not suggest that Congress meant to foreclose application of the traditional continuing violation rule. Finally, the two-year restriction is not surplusage even if recovery generally is limited to violations that occurred within the charge-filing period; the 300-day limitation may sometimes be equitably tolled, and it does not apply to suits by the Attorney General under Section 707, 42 U.S.C. 2000e-6. There similarly is no inconsistency between the dollar caps that Congress placed on compensatory and punitive damages in Title VII cases, see 42 U.S.C. 1981a, and a temporal requirement restricting recovery to violations that occurred within the limitations period.

3. The court of appeals' holding in this case is inconsistent with the traditional continuing violation doctrine. Contrary to the Ninth Circuit's analysis, respondent may not recover for alleged violations that occurred outside the 300-day limitations period (*i.e.*, before May 3, 1994), although those actions may be relevant evidence about respondent's conduct during the limitations period.

ARGUMENT

A TITLE VII CLAIMANT MAY RECOVER FOR A VIOLATION THAT OCCURRED WITHIN THE CHARGE-FILING PERIOD DESPITE EARLIER NOTICE OF THE UNLAWFUL EMPLOYMENT PRACTICE, BUT MAY NOT RECOVER FOR A VIOLATION THAT OCCURRED OUTSIDE THE CHARGE-FILING PERIOD

A. Title VII Violations That Continue Into The Charge-Filing Period Remain Actionable Despite The Claimant's Prior Notice Of The Violation

A claimant's prior notice of an ongoing Title VII violation does not deprive the claimant of the ability to recover for violations that continue into the charge-filing period. It is well-settled in antitrust, tort, and contract cases that a private plaintiff may recover for a violation that continues into the limitations period, even if the plaintiff knew or should have known of the illegal course of conduct much earlier and outside the limitations period. The text of Title VII and its legislative history are consistent with that traditional rule. Section 706(e) states simply that the potential plaintiff shall file any charge with the EEOC within 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e). Nothing in the language or history of Section 706(e) indicates that Congress intended to preclude suits that challenge ongoing violations. Accordingly, when an unlawful employment practice continues into the applicable charge-filing period, the plaintiff may seek redress for that violation, without regard to when the plaintiff knew or should have known of the practice.

1. In its usual form, the so-called continuing violation doctrine allows a suit that might otherwise be barred by the

statute of limitations to proceed, although the plaintiff may not recover for injury that occurred outside the limitations period. In the case of an ongoing antitrust violation, such as a price-fixing conspiracy, "'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory [limitations] period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.' * * * But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by the old overt acts outside the limitations period." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (quoting 2 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 338b, at 145 (rev. ed. 1995)); see *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 502 & n.15 (1968) ("Although Hanover could have sued [under the Sherman Act] in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955" for damages within the limitations period.). The continuing violation doctrine therefore provides that each successive illegal act resets the date at which the statute of limitations begins to run. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971).[2]

A similar rule applies in tort law. See Restatement (Second) of Torts § 899, at 441-444, cmts. c, d (1979). In nuisance cases, for instance, "each day's continuance of a temporary nuisance creates a new cause of action," and, therefore, "the statute of limitations begins to run day by day, and plaintiff may at any time recover for the nuisance committed during the statutory period next before the bringing of the action." 1 F. Harper et al., *The Law of Torts*

[2] Different limitations rules apply in criminal conspiracy cases. See *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB (Bryan Mfg.)*, 362 U.S. 411, 423-424 n.15 (1960); *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 155-156 (1987) (RICO).

§ 1.30, at 1:139 (3d ed. 1996); see also W. Prosser, *Handbook of the Law of Torts* 616 (3d ed. 1964) (noting that "a continuing trespass, such as the erection of a structure on the plaintiff's land, affords a continuing cause of action, which can hardly be distinguished from nuisance") (footnote omitted).

So too, in contracts, the applicable statute of limitations generally begins to run as soon as each claim accrues, and the occurrence of similar or continuing breaches does not revive untimely claims. For instance, if performance is required in discrete parts over a period of time, and a timely action is not brought to challenge an initial breach, future recovery for the initial breach is barred, although recovery on later breaches that occurred within the limitations period is possible. See generally 18 W. Jaeger, *Williston on Contracts* §§ 2026-2029, at 782-817 (3d ed. 1978).

Of particular relevance is the rule's application under Section 10(b) of the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 453-454 (29 U.S.C. 160(b)). Just as other remedial provisions of Title VII were modeled on the NLRA, see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11 (1975), Section 706(e) has its origin in Section 10(b) of the NLRA. See *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 909-910 (1989).[3] This Court has held that the time limitations of Section 706(e) should be treated in the same manner as those contained in the NLRA. *Zipes* v. *TWA*, 455 U.S. 385, 395 n.11 (1982). "Such reliance is particularly appropriate in the context presented here, since the highly unusual feature of requiring an administrative complaint before a civil action

[3] Section 10(b) of the NLRA provides, in relevant part, that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of [a] charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made." 29 U.S.C. 160(b).

can be filed against a private party is common to the two statutes." *Lorance*, 490 U.S. at 909. And when interpreting Section 706(e), "reference must be made to actual operation and experience * * * in administering the [NLRA]." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 774-775 n.34 (1976); cf. *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1950 (2001) (construction of NLRA Section 10(c) before enactment of Civil Rights Act of 1964 provides "guidance as to the proper meaning of the same language in § 706(g) of Title VII").

By 1964, when Congress looked to the NLRA in drafting Title VII, it was established that Section 10(b)'s six-month limitations period was subject to the traditional continuing violation doctrine. An unfair labor practice that occurred within the six-month period could be challenged even if a charge alleging the same violation, or a similar and related violation, could have been brought before the six-month period.[4] But a charge could not be brought outside the limi-

[4] *E.g.*, *NLRB* v. *Carpenters Local Union No. 1028*, 232 F.2d 454, 456 (10th Cir.) (discriminatory enforcement of closed-shop agreement during limitations period satisfies Section 10(b)), cert. denied, 352 U.S. 839 (1956); *NLRB* v. *Dallas Gen. Drivers, Local Union 745*, 228 F.2d 702, 705 (5th Cir. 1956) ("[I]f the contract provision giving the Union sole power to settle seniority disputes violated the Act, or if the Union exercised that power discriminatorily, each time it did so constituted a separate and distinct act, whether or not the decision so to act was made outside the six-month period."), cert. denied, 361 U.S. 814 (1959); *NLRB* v. *International Bhd. of Teamsters*, 225 F.2d 343, 345-346 (8th Cir. 1955) (rejecting argument that employees had notice of discriminatory seniority system before the limitations period); *NLRB* v. *F.H. McGraw & Co.*, 206 F.2d 635, 639 (6th Cir. 1953) (finding a "continuing offense" where "the unfair labor practice alleged in the complaint was not the execution of this contract, but its enforcement and implementation * * * within the period of limitations"); *Katz* v. *NLRB*, 196 F.2d 411, 415 (9th Cir. 1952) ("continued and continuous enforcement" of illegal union shop agreement constituted continuing violation); *Melville Confections, Inc.*, 142 N.L.R.B. 1334, 1335 & n.1, 1337-1339 (1963) (finding that a profit-sharing plan adopted in 1957 "and made known to [the company's] employees at all times thereafter" warranted relief when charge was filed in September 1962), enforced, 327 F.2d 689, 692 (7th Cir.), cert. denied, 377 U.S. 933 (1964).

tations period when the alleged unfair labor practice was "fully consummated" and caused injury more than six months before the charge was filed. *Bowen Prods. Corp.*, 113 N.L.R.B. 731, 732 (1955); see, *e.g.*, *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB* (*Bryan Mfg.*), 362 U.S. 411, 422-423 (1960); *NLRB* v. *Pennwoven, Inc.*, 194 F.2d 521, 525 (3d Cir. 1952).

Although termed the "continuing violation" doctrine, the doctrine applied under the NLRA did not mean that violations that occurred outside the limitations period were revived and became actionable because a course of violations continued into the limitations period. Rather, relief was awarded only for violations within the six-month period. See, *e.g.*, *Melville Confections, Inc.*, 327 F.2d at 692. Remedies such as back pay "would only start from the day six months before the filing of the charge[]," and were not available to remedy related violations outside the six-month period. *Pennwoven, Inc.*, 194 F.2d at 525; see *id.* at 524 (discussing National Labor Relations Board's position); see also *Pennwoven, Inc.*, 94 N.L.R.B. 175, 192 (1951) (trial examiner's decision).[5]

2. In 1972, eight years after it drew on the NLRA precedent in drafting Section 706 of the Civil Rights Act, Congress amended Title VII by, among other things, expanding the limitations period to 180 or 300 days, rather than the 90 or 210 days it had specified in 1964. See generally *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818-824 (1980). That amend-

[5] Without rejecting the Board's legal approach to continuing violation cases, the Third Circuit held in *Pennwoven* that the facts presented did not establish a new violation within the charge-filing period. 194 F.2d at 524-526.

ment did not, however, signal a departure from the NLRA model. To the contrary, the House and Senate committee reports on the 1972 amendments referred to the new 180-day limitations period as being "similar to" or "identical to" the six-month limitations period that applied under Section 10(b) of the NLRA. S. Rep. No. 415, 92d Cong., 1st Sess. 37 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 65 (1971) (Minority Views).

The drafters of the 1972 amendments were aware that courts had applied the continuing violation doctrine under Title VII since 1964, and they approved of those decisions. See 118 Cong. Rec. 7166, 7167 (1972) (section-by-section analysis of final bill, submitted on Senate floor, stating that "[e]xisting case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued"); *id.* at 4940, 4941 (summary of Senate bill, stating same). The history of Section 706(e) therefore can be read as ratifying the fundamental principle, already recognized by the courts, that when unlawful employment practices under Title VII "involve a pattern of conduct extending over a period of time, a 'continuing' violation rather than a single incident, * * * the [limitations] requirement is satisfied if the charge is filed with the EEOC while such conduct or pattern of conduct continues or within 90 [now 180 or 300] days after it ceases." *Jamison* v. *Olga Coal Co.*, 335 F. Supp. 454, 458 (S.D. W. Va. 1971); see, *e.g.*, *Watson* v. *Limbach Co.*, 333 F. Supp. 754, 765-766 (S.D. Ohio 1971) (citing cases); *Sciaraffa* v. *Oxford Paper Co.*, 310 F. Supp. 891, 896 (D. Me. 1970) (same). Furthermore, the "[e]xisting case law" referenced by legislators, 118 Cong. Rec. at 7167, commonly allowed suits to proceed when it was apparent that the plaintiff had notice of the unlawful practice more than 90 days before the plaintiff filed with the EEOC. See,

e.g., *Mixson* v. *Southern Bell Tel. & Tel. Co.*, 334 F. Supp. 525 (N.D. Ga. 1971); *Watson*, 333 F. Supp. at 765; *Tippet* v. *Liggett & Myers Tobacco Co.*, 316 F. Supp. 292, 294-296 (M.D.N.C. 1970); *Sciaraffa*, 310 F. Supp. at 894, 896-897; *Culpepper* v. *Reynolds Metals Co.*, 296 F. Supp. 1232, 1234-1236 (N.D. Ga. 1968), rev'd in part on other grounds, 421 F.2d 888 (5th Cir. 1970).

3. This Court's decisions confirm that a Title VII plaintiff may recover for discrimination that occurs within the charge-filing period despite having notice of a violation outside the period, but may not recover for violations that occurred outside the period. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), the Court ruled that a continuing practice of salary discrimination that began before Title VII's effective date was actionable, but only "to the extent [the] employer continued to engage in that act or practice." *Id.* at 395 (Brennan, J., joined by all other Members of the Court, concurring in part). The Court explained that acts that are the subject of time-barred claims "ha[ve] 'no present legal consequences,'" and that "[t]he 'critical question' * * * 'is whether any *present violation* exists.'" *Id.* at 396 n.6 (quoting *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)). In *Bazemore* there was a present violation, because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-396.

In *Lorance* v. *AT&T Technologies, Inc.*, *supra*, the Court again suggested that notice of a continuing violation does not preclude a plaintiff from recovering for violations within the limitations period. The Court held that an employer's adoption of a facially *neutral* seniority system with discriminatory intent does not constitute an ongoing violation that can be challenged after the limitations period runs. 490 U.S. at 905-911. The Court noted, however, that a facially *discri-*

minatory seniority system "discriminates each time it is applied," and therefore "can be challenged at any time," even though discrimination may have been obvious at its adoption. *Id.* at 912 & n.5. See also *Delaware State College* v. *Ricks*, 449 U.S. 250, 257, 259-260 (1980) (finding action time-barred where plaintiff failed to identify discriminatory acts that continued into the limitations period); *Evans*, 431 U.S. at 558 (same).[6]

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982), is consistent with those decisions. In *Havens Realty*, the Court permitted plaintiffs to seek relief under the Fair Housing Act, 42 U.S.C. 3604, for racial "steering," some of which occurred within the limitations period, but some of which was outside the limitations period. The Court rejected the landlord's argument that the suit could not go forward because the plaintiffs "were fully apprised of the facts and of their rights" before the six-month limitations period. Pet. Br. at 33, *Havens Realty Corp.*, *supra* (No. 80-988). The Court held, instead, that the plaintiffs could sue because they had alleged "an unlawful practice that continue[d] into the limitations period," 455 U.S. at 381 (footnote omitted), and that caused current injury, see *id.* at 379, 381, 382. At the same time, the plaintiffs could not maintain claims that related solely to incidents outside the limitations period. *Id.* at 381. The Court did not address the appropriate measure of relief. Rather, it noted that the parties had entered into an agreement that, if approved by the district court, would

[6] In 1991, Congress legislatively overruled the narrow holding of *Lorance* and allowed challenges to the application of facially neutral but intentionally discriminatory seniority systems after their adoption. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1078-1079 (42 U.S.C. 2000e-5(e)(2)). Congress, however, did not alter the general rule that one-time acts of discrimination are not actionable outside the limitations period, even if their effects are still being felt.

have liquidated the plaintiffs' monetary damages and made quantification unnecessary. See *id.* at 371.

4. Allowing recovery for discrimination within the charge-filing period without regard to whether the plaintiff had prior notice of the unlawful practice—but not for violations that occurred before the charge-filing period—furthers the remedial purposes of Title VII. "[T]he primary objective" of Title VII "was a prophylactic one." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). Although Congress wanted individuals who are targets of discrimination to be made whole for those violations that are actionable, see *id.* at 418, Congress above all wanted "to achieve equality of employment opportunities and remove barriers that ha[d] operated in the past to favor an identifiable group of white employees over other employees," *id.* at 417 (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971)). It would undermine that "dominant purpose * * * to root out discrimination in employment," *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 77 (1984), if persons who are subjected to ongoing employment discrimination could not sue within the charge-filing period because they were or should have been on prior notice of the violation.

Allowing private plaintiffs to sue on all violations that occur within the charge-filing period, without regard to notice, also serves Congress's objective of encouraging conciliation and informal resolution of disputes. Congress wanted "to promote conciliation rather than litigation in the Title VII context," *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764 (1998), and accomplishment of that objective requires employees promptly to report possible discrimination to their employer. The Court has recognized, for example, that Title VII's objectives are served when employees are encouraged to report sexual harassment to their employer before it becomes severe or pervasive. *Ibid.* If an employee who reported harassment in its early stages (1)

were deemed to have demonstrated knowledge of her claim and (2) consequently became disabled from suing if the harassment continued, Title VII's limitations rules could become an obstacle to informal and early termination of discriminatory conduct. Employees would be discouraged from giving their employer prompt notice of harassment and from attempting to resolve disputes informally. And, to the extent that employees attempted to protect their Title VII claims by filing a charge with the EEOC after each indication of conceivably actionable harassment, the EEOC and the courts would be burdened by a flood of incident-specific suits. Cf. *Heard* v. *Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001) (Section 1983 claim).[7]

Finally, allowing suits for unlawful practices that occur within the limitations period effectuates Congress's policy of "protect[ing] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257. Although staleness concerns generally "disappear[]" when suit is brought on a violation within the limitations period, *Havens Realty*, 455 U.S. at 380, permitting a plaintiff to challenge related violations that occurred outside the limitations period would threaten injustice by reviving "claims that have been allowed to

[7] In harassment cases, "duration is often necessary to convert what is merely offensive behavior * * * into an actionable alteration in the plaintiff's working conditions." *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138, 1139 (7th Cir. 1997) (citations omitted). Confusingly, courts sometimes refer to claims that take a long time to accrue as continuing violations. See, *e.g.*, *Frazier* v. *Delco Elecs. Corp.*, No. 99-2710, 2001 WL 964933, at *2 (7th Cir. Aug. 24, 2001); *Freeman* v. *Madison Metro. Sch. Dist.*, 231 F.3d 374, 381 (7th Cir. 2000). When it remanded respondent's pre-limitations hostile environment claims for trial, however, the court of appeals in this case did not rely on a theory that respondent's cause of action had not yet accrued as of May 3, 1994. See Pet. App. 19a-20a.

slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

By permitting suits for violations within the limitations period, and foreclosing suits for violations outside the limitations period, Congress has balanced the competing interests of employees, employers, and the public. Allowing Title VII claimants to sue within the limitations period even if they had earlier notice of the unlawful employment practice safeguards the important role of private suits in promoting compliance and in obtaining compensation for the victims of discrimination, and ensures that employers have an ongoing incentive to comply with Title VII. Prohibiting suit on pre-limitations claims encourages potential plaintiffs to bring their claims promptly and protects employers against the unfairness of defending against stale claims. Neither the open-ended liability allowed by the court of appeals in this case, nor strict enforcement of a notice rule to bar suits that challenge ongoing violations, would be consistent with Congress's balance or with the analogous rules developed in other areas of law.

5. Although notice outside the limitations period should not be a complete bar to recovery, notice is relevant in continuing violation cases, as in other contexts. This Court held in *Zipes* that the filing deadlines of Section 706(e) are "subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393. A Title VII plaintiff therefore could recover for conduct that occurred outside the limitations period when, for example, the employer's misconduct prevented the plaintiff from receiving notice of the violation. See generally *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam) (discussing equitable doctrines); *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-453 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) (same); *Wolin* v.

Smith Barney Inc., 83 F.3d 847, 851-853 (7th Cir. 1996) (same).

Moreover, some courts have applied the discovery rule to determine when a claim accrues in Title VII cases. Under such a rule, the charge-filing period begins to run with respect to a particular incident when the potential plaintiff learns (or with diligence should have learned) of his injury. See, *e.g.*, *Oshiver* v. *Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385-1387 (3d Cir. 1994); *Cada*, *supra*; see generally 2 P. Cox, *Employment Discrimination* ¶ 22.02, at 22-14 to 22-15.0 (3d ed. 2000) (discussing cases); 2 B. Lindemann et. al., *Employment Discrimination Law* 1347-1350 (3d ed. 1996) (same). That approach makes notice an aspect of claim-accrual.

B. Neither Caps On Back Pay Nor Damages Provisions Demonstrate That Congress Intended To Allow Recovery For Unlawful Practices That Occurred Outside The Charge-Filing Period

The language and history of Section 706(e), and the policies underlying Title VII, thus support application of the traditional rule that each act in furtherance of a wrongful scheme begins a new limitations period, but does not revive claims based on violations outside the limitations period. Nonetheless, the court of appeals in this case applied a rule that "contrasts sharply with the principle applied to continuous courses of wrongful conduct in other areas of the law," *Johnson* v. *Nyack Hosp.*, 891 F. Supp. 155, 162 n.5 (S.D.N.Y. 1995), aff'd, 86 F.3d 8 (2d Cir. 1996), and allows the plaintiff to recover for conduct outside the limitations period as long as it is closely related to conduct within the period. Pet. App. 14a-20a. Other lower courts also allow challenges to pre-limitations conduct under certain circumstances. *E.g.*, *Sabree* v. *United Bhd. of Carpenters Local No. 33*, 921 F.2d 396, 399-402 (1st Cir. 1990); *Berry* v. *Board of Supervisors of*

L.S.U., 715 F.2d 971, 979-981 (5th Cir. 1983). The EEOC adheres to that approach as well. See, *e.g.*, *Anisman* v. *O'Neill*, Appeal. No. 01994634, 2001 WL 402493, at *5 (EEOC Apr. 12, 2001). Nothing in Title VII supports such disregard for Section 706(e)'s incorporation of the traditional continuing violation doctrine.

1. One argument for deviating from the traditional rule focuses on Section 706(g), which has provided since 1972 that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. 2000e-5(g)(1). A two-year limitation on back pay, the argument goes, would not have been needed if the charge-filing deadlines of Section 706(e) limited recovery (including back pay) to violations that occurred within 300 days of the filing of the charge. See, *e.g.*, *Sabree*, 921 F.2d at 401.

That argument is not persuasive. Whereas the limitations language of Section 706(e) speaks directly to when suit must be brought, Section 706(g) merely sets an outer limit on back pay that, on its face, does not foreclose application of a shorter limitations period. Nor does the legislative history of Section 706(g) suggest that Congress meant to foreclose application of the traditional rule developed in antitrust, tort, contract, and labor cases.

Section 706(g)'s two-year limitation arose initially out of a concern that employers could, absent such a limitation, be subject to large back pay awards in federal "pattern or practice" suits brought under Section 707, 42 U.S.C. 2000e-6, which did not have any time limitation (other than that an action could not reach conduct before the effective date of the 1964 Act). See H.R. Rep. No. 238, *supra*, at 65-66 (Minority Views). The inclusion of current Section 707(e), 42 U.S.C. 2000e-6(e), in the 1972 legislation lessened (but did not completely eliminate, see p. 25, *infra*) that concern because it applied the procedures of Section 706 to EEOC

actions under Section 707. Nevertheless, the two-year cap on back pay was included in the final version of the 1972 amendments as well. Supporters of the two-year provision urged that it was needed because the EEOC and some courts were not interpreting the 90-day charge-filing period as a limitation on recovery under Section 706. See 117 Cong. Rec. 31,973, 31,974, 31,981 (1971) (Rep. Erlenborn); *id.* at 31,979 (Rep. Dent). The supporters did not endorse those decisions, however, and other contemporaneous court decisions placed a 90-day limitation on back pay in light of the charge-filing deadline. See *United States* v. *Georgia Power Co.*, Civ. No. 12355, 1971 WL 162, at *27, *28-*29 (N.D. Ga. June 30, 1971) (Sections 706 and 707), rev'd in part, 474 F.2d 906 (5th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 349 F. Supp. 3, 18 n.8 (S.D. Tex. 1972), rev'd in part, 491 F.2d 1364 (5th Cir. 1974). In the end, the 1972 amendments did not include any language stating whether recovery was or was not available beyond the limitations period, but simply ensured that, however the courts answered that question, back pay would not be available for more than two years beyond the filing of the charge. 42 U.S.C. 2000e-5(g)(1).

This Court's decision in *Evans* further undercuts any argument that the 1972 amendments ratified awards of back pay beyond the limitations period. To the extent that courts made such awards before the 1972 amendments, they generally did so under the so-called "effects theory," which held that "if an act originating in the past operates to discriminate against the complainant at the present time, there is a continuous violation." Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1210 (1971). The *Evans* Court rejected the effects theory in 1977. 431 U.S. at 557-558; see J. Carty, *The Continuing Violation Theory of Title VII After United Air Lines, Inc.* v. *Evans*, 31 Hastings L.J. 929, 936-949 (1980). Congress has not overruled the holding of *Evans* through

legislation. Accordingly, it cannot persuasively be argued that Congress has validated back pay awards that were made under a theory of liability that *Evans* rejected. See D. Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 58 (1986).

Finally, a general rule limiting recovery to violations within the limitations period does not render the two-year limitation on back pay superfluous. Equitable doctrines may extend the charge-filing period (and thus the recovery period) beyond 300 days, so that the two-year limitation might apply. See D. Laycock, *supra*, at 58. Moreover, the United States has long taken the position that the charge-filing periods of Section 706(e) are not relevant to investigations and suits by the Attorney General (rather than the EEOC) under Section 707. The concern about federal pattern or practice suits that initially motivated legislators to propose a two-year restriction on back pay thus remains relevant, and Section 706(g) serves as a restriction on relief in some Section 707 actions. See *United States* v. *Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 & n.5 (9th Cir.), cert. denied, 444 U.S. 832 (1979).

• 2. Congress's authorization of capped awards of compensatory damages (relating to non-pecuniary losses) and punitive damages under the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. 1981a), likewise is consistent with the traditional rule that limits recovery to violations occurring within the limitations period. Dollar limits on damages are compatible with temporal limits on recovery, and the two restrictions implicate different considerations. The dollar caps were part of a legislative compromise in 1991 that made compensatory and punitive damages available for the first time, but subjected them to statutory caps. The 1991 Act, however, did not modify Section 706(e)'s limitations period, nor did it otherwise change

the recovery previously available under the Civil Rights Act of 1964 and the 1972 amendments. See *Pollard*, 121 S. Ct. at 1951-1952.

3. Finally, there is no practical obstacle to applying the traditional continuing violation doctrine to Title VII cases. Awarding relief for only the later violations in a series of related violations is not unworkable. To be sure, fixing the precise amount of damages due for those violations that are within the limitations period may sometimes prove difficult. For example, although it may be straightforward for a jury to determine whether particular out-of-pocket costs such as moving and job-search expenses flow from a violation within the limitations period, it may be more difficult to decide whether medical or psychiatric treatments, or pain and suffering, are attributable to violations after the limitations period began to run, rather than before. But such problems of proof are not unique to Title VII, and they can be addressed through the "[c]onventional rules of civil litigation" that apply to Title VII claims. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (opinion of Brennan, J.). Those "conventional rules" draw a "clear distinction between the measure of proof necessary to establish the fact that [a plaintiff] had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Ibid.* (quoting *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)). The plaintiff need not establish the amount of damages with exactitude, but is required only to establish "a basis for a reasonable inference as to the extent of the damages." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946).

C. Respondent May Not Recover For Discrimination That Occurred Outside the 300-Day Charge-Filing Period

It follows from the principles set forth above that the court of appeals in this case erred when it held that

petitioner's "pre-limitations period conduct should have been presented to the jury * * * for purposes [of] liability." Pet. App. 21a. Evidence about respondent's conduct was, rather, "relevant background evidence," *Evans*, 431 U.S. at 558, particularly insofar as it "tend[ed] reasonably to show the purpose and character of" allegedly discriminatory acts that occurred within the limitations period, *FTC* v. *Cement Inst.*, 333 U.S. 683, 705 (1948). This rule of evidence is particularly significant as applied to respondent's post-limitations hostile work environment claim, which must be evaluated based on the totality of the circumstances. See *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); cf. *Van Steenburgh* v. *Rival Co.*, 171 F.3d 1155, 1159 (8th Cir. 1999) ("An incident within the limitations period need not satisfy the definition of sexual harassment under Title VII when viewed in isolation. Rather, the jury must be capable of perceiving the incident as 'discriminatory' in light of all the prior incidents of sexual harassment.") (citations omitted). But see, *e.g.*, *Sowell* v. *Alumina Ceramics, Inc.*, 251 F.3d 678, 682-683 (8th Cir. 2001); *Minor* v. *Ivy Tech State College*, 174 F.3d 855, 857 (7th Cir. 1999).

The district court acknowledged the relevance of pre-limitations conduct in its decision granting partial summary judgment for petitioner. Pet. App. 40a-41a n.9. Respondent has suggested, however, that the district court's instructions to the jury took too narrow a view of the use that could be made of the evidence. *Id.* at 6a; see C.A. E.R. 464 ("You will not consider this evidence for any purpose other than providing context."); *id.* at 878 (pre-limitations evidence "will help you understand the context in which [the post-limitations occurrences] happened, who the players were and all of that."). That issue is not implicated by the question presented, but it could be considered by the court of appeals on remand. See Pet. App. 21a ("In light of our ruling, we need

not specifically rule on the evidentiary issues raised by Morgan.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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28 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
ALLEGEDLY DISCRIMINATORY CONDUCT OCCURRING OUTSIDE OF TITLE VII'S LIMITATIONS PERIOD MAY BE ACTIONABLE AS PART OF A "CONTINUING VIOLATION" ONLY IF EXPECTING AN INDIVIDUAL TO SUE ON IT BEFORE THE LIMITATIONS PERIOD EXPIRED WOULD HAVE BEEN UNREASONABLE	6
I. THE LANGUAGE OF TITLE VII, TOGETHER WITH THIS COURT'S CONSISTENT REFUSAL TO REVIVE STALE CLAIMS, SUPPORTS A NARROW APPLICATION OF THE CONTINUING VIOLATION THEORY LIMITED TO SITUATIONS IN WHICH AN INDIVIDUAL REASONABLY COULD NOT HAVE KNOWN WITHIN THE STATUTORILY ALLOTTED TIME-PERIOD THAT HE HAD AN ACTIONABLE CLAIM UNDER TITLE VII	6
A. Title VII Requires an Aggrieved Individual To File an Administrative Charge Within 180 or 300 Days of the Allegedly Discriminatory Event	6

TABLE OF CONTENTS—Continued

Page

B. This Court Consistently Has Applied the Continuing Violation Theory Narrowly..... 8

1. A Continuing Violation Requires a Present Violation..... 9

2. The Balance This Court's Decisions Strike Between Providing Remedies for Employment Discrimination and Avoiding Stale Claims Effectively Precludes Allowing the Mere Existence of a Present Violation To Be Part of a Continuing Violation 10

C. This Court Should Limit Actionable Conduct Under a Continuing Violation Theory to Claims on Which an Individual Reasonably Could Not Be Expected To Sue Before the Limitations Period Expired..... 12

1. The Continuing Violation Theory Should Apply Only To Conduct That Must Be Assessed in Light of Later Conduct Before an Individual Reasonably Could Have Known Whether To Assert Rights Under Title VII 12

2. In Contrast, Discrete Employment Actions Are Actionable Individually and Thus Not Part of a Continuing Violation 14

TABLE OF CONTENTS—Continued

Page

II. ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND WOULD SEVERELY PREJUDICE EMPLOYERS BY LIMITING THEIR ABILITY TO DEFEND STALE EMPLOYMENT ACTIONS AND WOULD THWART TITLE VII'S GOAL OF AVOIDING DISCRIMINATION 17

A. Allowing Aggrieved Individuals To File EEOC Charges Outside the Limitations Period on Discrete Employment Actions Would Conflict With the EEOC's Recordkeeping Requirements Under Title VII and Would Impose an Undue Burden on Employers To Defend Against Stale Claims 17

B. Title VII's Goal of Avoiding Discrimination, Which Led This Court To Recognize an Affirmative Defense to Sexual Harassment Claims Under Certain Circumstances, Supports Setting a Reasonable Person Standard To Establish When Conduct Is Part of a Continuing Violation .. 19

CONCLUSION..... 22

TABLE OF AUTHORITIES

CASES — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6
Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001) 20, 21, 22
Bazemore v. Friday, 478 U.S. 385 (1986) 9, 10
Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983) 14
Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999) 14, 15, 16
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 19, 20
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) 11
Chardon v. Fernandez, 454 U.S. 6 (1981) 10
Delaware State Coll. v. Ricks, 449 U.S. 250 (1980) 7, 10, 11
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 19, 20
Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1996) 12, 13, 14, 21
Gipson v. KAS Snacktime Co., 83 F.3d 225 (8th Cir. 1996) 15
Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554 (5th Cir. 1985) 14
Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 16
High v. University of Minnesota, 236 F.3d 909 (8th Cir. 2000) 15
International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 7, 8
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 11

TABLE OF AUTHORITIES—Continued

Page

Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997) 16
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 7, 8
Parkins v. Civil Constructors, Inc., 163 F.3d 1027 (7th Cir. 1998) 20
Stolzenburg v. Ford Motor Co., 143 F.3d 402 (8th Cir. 1998) 15, 16
United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 8, 9, 11, 12
Webb v. Cardiothoracic Surgery Assocs., 139 F.3d 532 (5th Cir. 1998) 13, 14

STATUTES

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.* ..... *passim*
42 U.S.C. § 2000e-5(e) 5, 7, 8, 16
42 U.S.C. § 2000e-5(f) 7

REGULATIONS

29 C.F.R. § 1602.14 17

IN THE

Supreme Court of the United States

No. 00-1614

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae*.[1] A letter of consent from all parties has been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, National Railroad Passenger Corporation.

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[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 360 of the nation's largest private sector corporations, collectively employing over 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, members of EEAC and the Chamber have a substantial interest in the issue presented in this case, *i.e.*, whether an individual who declined to file a charge within Title VII's limitations period on discrete allegedly discriminatory

employment actions subsequently may revive them simply by arguing that they are "sufficiently related" to allegedly discriminatory acts that fall within the applicable limitations period.

EEAC and the Chamber seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters, EEAC and the Chamber are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Abner Morgan, Jr., an African-American male, worked for the National Railroad Passenger Corporation, dba Amtrak ("Amtrak"), from August 1990 until his termination in March 1995. Pet. App. 7a-12a. During his employment, Morgan received several disciplinary actions, including written and verbal counselings and suspensions from work without pay, for violating work rules and absenteeism. *Id.* at 6a-12a. Morgan claims that he requested and was denied career opportunities at various times while working for Amtrak. *Id.* He was terminated by Amtrak in 1995 for violating a work rule. *Id.* at 11a-12a.

Although Morgan filed a number of internal equal employment opportunity (EEO) complaints during the five years he worked at Amtrak, he did not file a charge with the Equal Employment Opportunity Commission (EEOC) until February 27, 1995, shortly prior to his termination. *Id.* at 13a. In his EEOC charge, Morgan alleged that he was subjected to race discrimination and retaliation, and endured a racially hostile working environment, in violation of Title VII during the entire five years he worked at Amtrak. *Id.* at 6a. Morgan

thus attempted to combine events that occurred outside Title VII's limitations period, in this case 300 days prior to the filing of his EEOC charge, with more recent events as a continuing violation in order to avoid dismissal of his older claims as time-barred. *Id.*

The U.S. District Court for the Northern District of California granted partial summary judgment in favor of Amtrak on the older claims. The district court ruled that conduct that had occurred more than 300 days from the date of the charge was time-barred. *Id.* at 13a. The district court allowed Morgan's timely claims to proceed to trial and a jury returned a verdict in favor of Amtrak. *Id.*

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the partial summary judgment decision. It interpreted the continuing violation theory to allow untimely claims to proceed if the "acts during the [limitations] period involve the same type of discrimination as those committed before the period." *Id.* at 17a (internal quotation and citation omitted). This standard asks only "whether there is a common type of discrimination, such as [racial] harassment, or if there is a common kind of employment action, such as repeated denial of a promotion." *Id.* (internal quotation and citation omitted). Applying its version of the continuing violation theory to Morgan's claims, the Ninth Circuit concluded that the pre-limitations conduct was "closely enough related to" the events occurring within the limitations period, and thus, properly the subject of Morgan's suit. *Id.* at 18a-20a.

Amtrak filed a petition with this Court for a writ of certiorari on the issue of whether a plaintiff who knowingly has allowed the statute of limitations to expire on alleged violations of federal anti-discrimination laws nevertheless may resurrect such claims if they are "sufficiently related" to incidents within the limitations period. The Court granted the petition.

SUMMARY OF ARGUMENT

Both the language of Title VII of the Civil Rights Act of 1964 ("Title VII") and this Court's repeated refusal to revive stale claims support limiting the continuing violation theory to situations in which an individual could not reasonably have known within the statutory time-period that he should assert his rights under Title VII. That law requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the allegedly discriminatory event. 42 U.S.C. § 2000e-5(e). This Court consistently has interpreted this statutory time-limit strictly to require a present violation. The balance that this Court's decisions strike between remedying workplace discrimination and avoiding stale claims effectively precludes the Ninth Circuit's view that the existence of a present violation alone is enough to treat stale claims as part of a continuing violation merely because they allege the same type of discrimination.

This Court should limit the continuing violation theory to apply only to claims on which an individual reasonably could not be expected to sue before the limitations period expired. Conduct should be part of a continuing violation only if an individual needs to assess it in light of later conduct in order to determine whether a violation of his rights under Title VII has occurred. In contrast, discrete employment actions are actionable on an individual basis, and thus not part of a continuing violation.

Allowing the Ninth Circuit's decision to stand would severely prejudice employers by limiting their ability to defend stale employment actions and would thwart Title VII's goal of avoiding discrimination. Allowing an individual to file a discrimination charge more than 300 days after a discrete, allegedly discriminatory, act occurred conflicts with the EEOC's recordkeeping requirements under Title VII and places an undue burden on an employer to maintain the

records necessary to defend its past actions. Title VII's goal of avoiding discrimination, the same concern that led this Court to recognize an affirmative defense to sexual harassment claims under certain circumstances, also supports holding a plaintiff's actions to a "reasonable person" standard to determine when conduct is part of a continuing violation.

ARGUMENT

ALLEGEDLY DISCRIMINATORY CONDUCT OCCURRING OUTSIDE OF TITLE VII'S LIMITATIONS PERIOD MAY BE ACTIONABLE AS PART OF A "CONTINUING VIOLATION" ONLY IF EXPECTING AN INDIVIDUAL TO SUE ON IT BEFORE THE LIMITATIONS PERIOD EXPIRED WOULD HAVE BEEN UNREASONABLE

I. THE LANGUAGE OF TITLE VII, TOGETHER WITH THIS COURT'S CONSISTENT REFUSAL TO REVIVE STALE CLAIMS, SUPPORTS A NARROW APPLICATION OF THE CONTINUING VIOLATION THEORY LIMITED TO SITUATIONS IN WHICH AN INDIVIDUAL REASONABLY COULD NOT HAVE KNOWN WITHIN THE STATUTORILY ALLOTTED TIME-PERIOD THAT HE HAD AN ACTIONABLE CLAIM UNDER TITLE VII

A. Title VII Requires an Aggrieved Individual To File an Administrative Charge Within 180 or 300 Days of the Allegedly Discriminatory Event

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). One of these prerequisites is that aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity

Commission (EEOC) within one hundred and eighty days after the alleged discriminatory event. 42 U.S.C. § 2000e-5(e).[2] Congress specifically decided that the time limitations would start with the date of the "alleged unlawful employment practice." *Id.*; *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980). Title VII makes only one exception to this requirement. Where the aggrieved individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e). No other exceptions extend the length of Title VII's limitations period.

Congress deliberately restricted the rights of individuals to raise Title VII claims when it set the length of the limitations period. In a related context, this Court cautioned courts against disregarding this restriction:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also International Union of Electrical,*

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[2] The second prerequisite is that an individual must file suit within ninety days of receiving a notice of the right to sue from the EEOC. 42 U.S.C. § 2000e-5(f).

Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation omitted).[3]

This Court concluded in *Mohasco* that in choosing the length of Title VII's limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to further its goal of precluding stale claims, stating: "it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. In light of Congress's decision, this Court advised: "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826. Those words of advice apply with equal force to this case.

B. This Court Consistently Has Applied the Continuing Violation Theory Narrowly

This Court has ruled before that prior conduct is not actionable as part of a continuing violation unless a present wrong exists within Title VII's limitations period. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). The converse,

[3] The 1972 amendments to Title VII enlarged the limitations period to 180 days. (codified as amended at 42 U.S.C. § 2000e-5(e)).

however, is not true. The occurrence of an allegedly discriminatory event within Title VII's limitations period does not revive all claims alleging the same type of discrimination that arose before the limitations period, as the Ninth Circuit held below.

1. A Continuing Violation Requires a Present Violation

In keeping with the plain language of Title VII, this Court applied the continuing violation theory narrowly in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to require a "*present violation*" of Title VII within the limitations period. *Id.* at 558 (emphasis added). In *Evans*, a flight attendant was forced to resign for violating a policy that later was found to be discriminatory. When she was rehired four years later, her seniority date did not reflect her prior service with the company. Evans did not file a timely administrative charge over her resignation, but tried to revive this claim after her rehire by alleging that the company's seniority system was part of a continuing violation that "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

This Court rejected Evans' argument because no current violation of Title VII existed at the time of her charge. The seniority system by itself did not treat similarly situated males and females differently on the basis of sex, and thus did not carry the prior discriminatory act—her forced resignation—forward into the present as a continuing violation. The Court instructed: "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* at 558. [4]

[4] *Compare Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (applying continuing violation theory where "[e]ach week's paycheck that delivers

This Court again refused to allow an individual's continued employment to expand the limitations period to cover an untimely discrimination claim in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case, the Court held the college's decision to deny Ricks tenure was the discriminatory act that marked the beginning of the limitations period, even though he did not feel one of the effects of the decision until his termination. Again, this Court reminded litigants that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257 (citing *Evans*). Likewise, this Court ruled in *Chardon v. Fernandez*, 454 U.S. 6 (1981), that the limitations period on plaintiff's claim began when he received notice of his impending termination, not on the actual date of his termination, even though he continued to work up to his last day.

2. The Balance This Court's Decisions Strike Between Providing Remedies for Employment Discrimination and Avoiding Stale Claims Effectively Precludes Allowing the Mere Existence of a Present Violation To Be Part of a Continuing Violation

The Court's prior decisions effectively preclude expanding Title VII's limitations period by allowing a present violation to revive stale claims as part of a continuing violation simply because they allege the same type of discrimination. In fact, this Court has said that the purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims.

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less to a black than to a similarly situated white is a wrong actionable under Title VII ... ").

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). A narrow application of the continuing violation theory encourages the prompt filing of claims, which in turn is likely to increase the accuracy of the determination as to whether unlawful discrimination occurred.

The decisions limiting the application of the continuing violation theory thus reflect this Court's view that the interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past"); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

Barring stale claims helps effectuate the employer's civil right to finality. The Court described the practical consequences of an individual's failure to file a timely charge in *Evans* as follows:

> United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

C. This Court Should Limit Actionable Conduct Under a Continuing Violation Theory to Claims on Which an Individual Reasonably Could Not Be Expected To Sue Before the Limitations Period Expired

1. The Continuing Violation Theory Should Apply Only To Conduct That Must Be Assessed in Light of Later Conduct Before an Individual Reasonably Could Have Known Whether To Assert Rights Under Title VII

Under certain limited circumstances, the continuing violation theory may allow an individual to challenge conduct occurring outside of Title VII's limitations period as part of a timely claim. In so doing, however, courts must still maintain a proper balance with the interest in avoiding stale claims.

The Seventh Circuit established an appropriate test in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), limiting the use of the continuing violation theory to situations in which the individual reasonably could not have perceived that the conduct was actionable within the limitations period. In *Galloway*, an employee who claimed that her co-worker had made repeated

derogatory and offensive comments to her of a sexual nature since 1987 did not file an administrative charge of sex discrimination with the EEOC until 1991. In allowing Galloway to challenge conduct that occurred more than 300 days before she filed her EEOC charge, the Seventh Circuit recognized that the particular nature of harassment claims makes the continuing violation theory applicable under certain circumstances: "Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event. In its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable." 78 F.3d at 1166 (citation omitted). For this reason, the court was willing to include pre-limitations conduct into a timely Title VII charge.

Nevertheless, the court appropriately reserved continuing violations to situations where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct," since a plaintiff should not benefit from her own inaction. *Id.* at 1167. "[I]n such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; *for she had no excuse for waiting that long*." *Id.* (emphasis added) (citations omitted).

The Fifth Circuit also has used the Seventh Circuit's standard to limit the use of the continuing violation theory in *Webb v. Cardiothoracic Surgery Associates*, 139 F.3d 532 (5th Cir. 1998). In that case, a plaintiff who knew she was experiencing unlawful harassment, but nevertheless failed to file a timely charge, could not include conduct that occurred outside of Title VII's limitations period in her lawsuit. *Id.* at

537-38.[5] This approach thus furthers Title VII's objective to promote the prompt filing and resolution of discrimination charges while recognizing that some harassing conduct may not alert an individual to the presence of a harassment claim until after the limitations period on some of the incidents has expired.

2. In Contrast, Discrete Employment Actions Are Actionable Individually and Thus Not Part of a Continuing Violation

The key question for Title VII's limitations period is "what event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560-61 (5th Cir. 1985) (citation omitted). The continuing violation theory maintains this focus by asking when an individual reasonably could be expected to know that his rights are being violated. According to the Tenth Circuit:

> The continuing violation doctrine "is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." Thus, a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence

[5] The Fifth Circuit has its own test to determine when to use the continuing violation theory to revive otherwise time-barred claims. That test asks whether the alleged acts involve the same protected basis and type of employment action, if they are recurring, and if they have the degree of "permanency" to trigger an individual's awareness of and duty to assert his rights. *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). As the *Webb* decision shows, however, the case law seems to focus on the last factor as determinative of when otherwise untimely conduct is part of a continuing violation, essentially reducing the test to the Seventh Circuit's *Galloway* standard.

> would have known, she was being discriminated against at the time the earlier events occurred.

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 (10th Cir. 1999) (citation omitted).

The rationale for applying the continuing violation theory, however, is absent where discrete employment actions, like being denied a promotion or receiving a disciplinary action, are involved. In those situations, the adverse employment action happens at a specific time and is sufficient to alert the aggrieved individual that his rights may have been violated.

For this reason, several circuits correctly have refused to apply the continuing violation theory to discrete acts. In *Gipson v. KAS Snacktime Co.*, 83 F.3d 225 (8th Cir. 1996), for example, the Eighth Circuit rejected plaintiff's characterization of his denial of a pay raise and alleged discriminatory demotion and reassignment as part of a continuing violation. Instead, these acts were time-barred under the state's anti-discrimination statute. The court explained: "a discrete, adverse employment action, such as a discharge, layoff, or failure to promote, constitutes a completed act at the time it occurred. The time for filing an administrative charge or commencing a lawsuit runs from the date of such a discriminatory act, even if its effects on the injured employee are long-lasting." *Id.* at 229 (internal quotation and citations omitted); *see also High v. University of Minnesota*, 236 F.3d 909 (8th Cir. 2000).

Likewise, the court held that repeated denials of promotions were discrete employment actions that were not part of a continuing violation in *Stolzenburg v. Ford Motor Co.*, 143 F.3d 402 (8th Cir. 1998). As a result, each non-promotion that occurred more than 300 days before the filing of an EEOC complaint was time-barred. "In order to establish a continuing violation . . . , a plaintiff must show that the acts of which he or she complains were not actionable

as discrete violations of the applicable law. *Id.* at 405 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). *See also Bullington*, 186 F.3d at 1311 (non-promotion two years earlier put plaintiff on notice that unlawful conduct had occurred, precluding use of a continuing violation theory to save her stale claims).

The Second Circuit followed the same approach in refusing to treat the denial of a pay raise, alleged demotion and termination as part of a continuing violation in *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997), *cert. denied*, 528 U.S. 817 (1999). The court reasoned: "[c]ompleted acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." *Id.* at 907 (internal quotation and citation omitted).

Unlike harassment cases, where the conduct may continue over a period of time before it becomes severe or pervasive enough to create a hostile work environment, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), a discrete employment action is actionable on its own. It does not require subsequent events to alert an individual that his rights may have been violated. Thus, an individual will know at the time the discrete employment action occurs whether he thinks he has experienced discrimination. If he thinks he has a claim, Title VII requires him to file a charge with the EEOC within 180 or 300 days of the event, depending on whether a state or local enforcement agency exists. 42 U.S.C. § 2000e-5(e). Otherwise, his claims are time-barred.

II. ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND WOULD SEVERELY PREJUDICE EMPLOYERS BY LIMITING THEIR ABILITY TO DEFEND STALE EMPLOYMENT ACTIONS AND WOULD THWART TITLE VII'S GOAL OF AVOIDING DISCRIMINATION

A. Allowing Aggrieved Individuals To File EEOC Charges Outside the Limitations Period on Discrete Employment Actions Would Conflict With the EEOC's Record-keeping Requirements Under Title VII and Would Impose an Undue Burden on Employers To Defend Against Stale Claims

Employers need to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The EEOC recognized this need when it set the retention period for employers to keep certain personnel and employment records under Title VII at one year from the date the record is made or the personnel action involved occurs, whichever is later, unless a charge has been filed. 29 C.F.R. § 1602.14. These records generally relate to discrete employment actions, like hiring, promotions and terminations.

The one-year retention period means employers will not destroy relevant documents as part of routine file maintenance before an individual has had the opportunity to file a charge of discrimination with the EEOC. Since Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Interpreting the continuing violation theory broadly as the Ninth Circuit has done to expand the limitations period well beyond 300 days severely prejudices employers who reasonably have relied on the regulation lawfully to destroy relevant documents. The employer will not have any documents to support employment actions it took more than one year ago, which will hamper drastically its ability to defend itself against a subsequent discrimination claim.

For instance, allowing the decision below to stand would permit an employee who has applied and been rejected for ten promotions during the twenty years he has worked at a company to file suit under Title VII on all of them under a continuing violation theory, as long as the last rejection arose within the applicable limitations period. Under the Ninth Circuit's decision, even if the employee believed the first nine rejections were discriminatory when they occurred, the employee could have remained silent without sacrificing his claims. The employer would not have any inkling during the employee's career of his perception of discrimination, but it still would have to defend itself on each employment action many years after it occurred.

The decision below effectively would require employers to save all personnel and employment records forever, since they would not be able to anticipate which employment decisions would generate discrimination charges or when. This response, however, places an undue burden on the employer and is one the EEOC expressly rejected by limiting Title VII's recordkeeping requirements to one year, unless a charge has been filed.

In contrast, using the continuing violation theory to cover only a continuing course of conduct leading to an actionable harassment claim does not pose the same recordkeeping concerns, since harassment claims are unlikely to involve the type of personnel or employment records that the EEOC requires an employer to keep.

B. Title VII's Goal of Avoiding Discrimination, Which Led This Court To Recognize an Affirmative Defense to Sexual Harassment Claims Under Certain Circumstances, Supports Setting a Reasonable Person Standard To Establish When Conduct Is Part of a Continuing Violation

This Court balanced the competing interests of complainants and employers when it developed an affirmative defense to harassment claims under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Where the employer has not taken any tangible employment action, it may raise an affirmative defense to liability and damages for harassment by a supervisor by showing two things: (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) that the alleged victim unreasonably failed to take advantage of any of the preventive or corrective measures the employer provided or to avoid harm otherwise. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The Court explained in *Faragher* that holding an individual to a reasonable care standard stems from the general theory of damages, which requires a victim to use reasonable means to avoid or minimize harm. The underlying premise of the affirmative defense is that an employer should not be responsible for harm the individual could have avoided. "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no

award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* at 807.[6]

In *Faragher*, this Court went on to describe Title VII's "'primary objective' . . . [as] not to provide redress but to avoid harm." 524 U.S. at 806. The affirmative defense accomplishes this objective by encouraging employers to develop, and individuals to use, effective complaint procedures.

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

Ellerth, 524 U.S. at 764 (citations omitted).

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[6] Several courts of appeals have upheld the availability of the affirmative defense based on the unreasonableness of the employee's inaction in response to the alleged harassment. *See, e.g., Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (refusing to excuse a plaintiff's failure to complain about alleged harassment based on a speculative fear of retaliation as unreasonable); *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027, 1038 (7th Cir. 1998) ("'the law against sexual harassment is not self-enforcing' and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists") (citation omitted).

The same considerations support establishing a "reasonable person" standard for determining when conduct is part of a continuing violation. A victim of discrimination who is aware of his rights, but fails to file a timely EEOC charge, knowingly allows a discriminatory situation to continue, frustrating Title VII. Requiring timely EEOC charges avoids harm by maximizing an employer's opportunity to learn of the alleged discrimination and to correct it promptly. Many instances may arise where employers, particularly large ones such as members of EEAC and the Chamber, are unaware of potentially discriminatory conduct occurring in the workplace. In these situations, they must rely on their employees to report any potential discrimination. Even if the conduct does not rise to the level of actionable discrimination, it still may disrupt the workplace and require attention. The sooner the employer learns of the potential discrimination, the sooner it can address it.

Prompt action clearly benefits the victim of alleged discrimination—"bringing of the suit is almost certain to stop the harassment, so that unlike certain cases of nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can always seek injunctive relief against a continuation of the unlawful conduct." *Galloway*, 78 F.3d at 1167 (citations omitted).

In fact, an early resolution of the situation also helps the workforce and the employer. "Reporting the harasser benefits the victim by allowing the company to halt future harassment. It benefits others who might be harassed by the same individual, and it benefits the company by alerting it to the disruptive and unlawful misconduct of an employee. Thus, the reporting requirement serves the primary objective of Title VII which is not to provide redress but to avoid harm." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (internal quotations and citation omitted).

The Ninth Circuit's decision to allow individuals who knowingly delay reporting discrimination to revive stale claims would subject individuals to more discrimination, not less, undermining the primary goal of Title VII. *See Barrett*, 240 F.3d at 267. The Seventh Circuit's approach, in contrast, respects fully the delicate balance Congress struck in enacting Title VII among an individual's interest in asserting a civil rights violation, an employer's interest in not defending stale claims, and the public's interest in promptly ending discriminatory practices.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER J. MORGAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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51 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus* 1

Summary of Argument 1

ARGUMENT 5

I. **THE TEXT AND LEGISLATIVE HISTORY OF THE TWO-YEAR BACK PAY LIMIT IN SECTION 706(g)(1) DEMONSTRATE THAT THE 1972 AMENDMENTS TO TITLE VII CODIFIED A CONTINUING VIOLATION DOCTRINE THAT PERMITS RECOVERY OF BACK PAY TWO YEARS PRIOR TO FILING THE CHARGE** 5

II. **THE INTERPRETATION OF TITLE VII NOW ADVANCED BY THE SOLICITOR GENERAL WOULD INVALIDATE EXISTING FEDERAL REGULATIONS AND DIRECTIVES.** 13

TABLE OF CONTENTS (continued)

Page

III. **DISQUALIFYING A PLAINTIFF FROM FULL RELIEF FROM A CONTINUING VIOLATION ON THE BASIS OF WHEN THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF THE DISCRIMINATORY NATURE OF THE EMPLOYER'S UNLAWFUL CONDUCT IS NOT SUPPORTED BY EITHER THE LANGUAGE OF THE ACT OR ITS LEGISLATIVE HISTORY.** 19

CONCLUSION 23

Appendix A —

THE LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 ..... A1

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 4, 22

Austin v. Reynolds Metals Co.,
327 F. Supp. 1145 (E.D. Va. 1970) 7n

Baker v. F & F Investment Co.,
489 F.2d 829 (7th Cir. 1983) 20

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Belt v. Johnson Motor Lines, Inc.,
458 F.2d 443 (5th Cir. 1972) 23

Berry v. Board of Supervisors of L.S.U.,
715 F.2d 971 (5th Cir. 1983) 20

Brown v. General Services Administration,
425 U.S. 820 (1976) 12, 13

Chevron U.S.C. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 16

Crawford v. Western Electric Co.,
614 F.2d 1300 (5th Cir. 1980) 20n-21n

EEOC v. Detroit Edison,
515 F.2d 301 (6th Cir. 1975) 9n

EEOC v. Enterprise Ass'n Steamfitters,
542 F.2d 570 (2d Cir. 1976) 9n

Franks v Bowman Transp. Co.,
424 U.S. 747 (1976) 22

Franks v. Bowman Transp. Co.,
495 F.2d 398 (5th Cir. 1974) 9n

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Guardians Ass'n of New York City v. Civil Serv. Comm'n,
633 F.2d 232 (2d Cir. 1980), *aff'd* 463 U.S. 582 (1983) 20n

Hairston v. McLean Trucking Co.,
520 F.2d 226 (4th Cir. 1975) 9n

Hall v. Ledex,
669 F.2d 397 (6th Cir. 1982) 21n

Havens Realty Corp v. Coleman,
455 U.S. 363 (1981) 3, 15n, 21

In re Consolidated Pretrial Proceedings,
582 F.2d 1142 (D.C. Cir. 1978), *aff'd in part & rev'd in part on other grounds sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 9n

Jewett v. ITT Corp.,
653 F.2d 89 (3d Cir. 1981) 12n

Johnson v. Goodyear Tire & Rubber Co.,
491 F.2d 1364 (5th Cir. 1974) 9

Johnson v. Goodyear Tire & Rubber Co.,
349 F. Supp. 3 (S.D. Tex. 1972) 8n

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Kuhnle Brothers, Inc. v. County of Geauga,
103 F.3d 516 (6th Cir. 1997) 20

Laffey v. Northwest Airlines, Inc.,
740 F.2d 1071 (D.C. Cir. 1984) 9n

Laffey v. Northwest Airlines, Inc.,
567 F.2d 429 (D.C. Cir. 1976) 9n

Lorance v. AT&T Technologies,
490 U.S. 900 (1989) 14

Malhotra v. Cotter & Co.,
885 F.2d 1305 (7th Cir. 1989) 20

Meat Cutters v. Safeway Stores,
4 FEP Cas. 510 (D. Kan. 1972) 8n

Milton v. Weinberger,
645 F.2d 1070 (D.C. Cir. 1981) 12n

Mixson v. Southern Bell Tel. & Tel. Co.,
334 F. Supp. 525 (N.D. Ga. 1971) 7n

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 14

Patterson v. Youngstown Sheet & Tube Co.,
659 F.2d 736 (7th Cir. 1981) 21n

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Pettway v. American Cast Iron Pipe Co.,
494 F.2d 211 (5th Cir. 1974) 9n

Rich v. Martin Marietta,
522 F.2d 333 (10th Cir. 1975) 21n

Roberts v. North American Rockwell Corp.,
650 F.2d 823 (6th Cir. 1981) 23

Sabree v. United Brotherhood of Carpenters & Joiners,
921 F.2d 396 (1st Cir. 1990) 20

Shehadeh v. Chesapeake & Potomac Tel. Co.,
595 F.2d 711 (D.C. Cir. 1978) 12n, 21n

Stallworth v. Schuler,
777 F.2d 1431 (11th Cir. 1985) 21n

Teamsters v. United States,
431 U.S. 324 (1977) 22

Tippett v. Liggett & Myers Tobacco Co.,
316 F. Supp. 292 (M.D.N.C. 1970) 8n

United States v. Georgia Power Co.,
474 F.2d 906 (5th Cir. 1973) 8n, 9

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

United States v. Georgia Power Co.,
1971 WL 162 *27, 3 FEP Cas. 767
(N.D. Ga. 1971) 8n

Watson v. Limbach Co.,
333 F. Supp. 754 (S.D. Ohio 1971) 7n

White v. Carolina Paperboard Corp.,
564 F.2d 1073 (4th Cir. 1977) 20n

Williams v. Owens-Illinois,
665 F.2d 918 (9th Cir. 1982) 21n

Statutes:

42 U.S.C. § 2000e-5(e)(1) 5, 6

42 U.S.C. § 2000e-5(g)(1) 5, 6

42 U.S.C. § 2000e-6(c) 7

42 U.S.C. § 2000e-16(b) 16

§ 706(e)(1), Civil Rights Act of 1964,
42 U.S.C. § 2000e-5(e)(1) 2, 7, 13

§ 706(g)(1), Civil Rights Act of 1964.
42 U.S.C. § 2000e-5(g)(1) ... 2, 7, 11, 13, 14, 15

TABLE OF AUTHORITIES (continued)

Page

Statutes (continued):

§ 717(a), Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a) 16

§ 717(b), Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b) 16

Regulations:

29 C.F.R. part 1614 15

29 C.F.R. §1614.105(a) 16

29 C.F.R. § 1614.106(b) 18

29 C.F.R. § 1614.204(l)(3) 18, 19

29 C.F.R. § 1614.407 18

29 C.F.R. § 1614.501(a) (4) 17

29 C.F.R. § 1614.501(b)(3) 18

29 C.F.R. § 1614.501(c)(1) 18

Management Directive 110, http://www.eeoc.gov/federal/md110.html . 15, 16, 17, 18

64 Fed. Reg. 37653 (1999) 19

TABLE OF AUTHORITIES (continued)

Page

Regulations (continued):

57 Fed. Reg. 12644 (1992) 19

Congressional Materials:

117 Cong. Rec. 26555 (1971) A5

117 Cong. Rec. 31784 (1971) A6

117 Cong. Rec. 31961 (1971) A6

117 Cong. Rec. 31973 (1971) A7

117 Cong. Rec. 31979 (1971) A7

117 Cong. Rec. 32097 (1971) A8

117 Cong. Rec. 32106 (1971) A7

117 Cong. Rec. 39739 (1971) A10

118 Cong. Rec. 1071 (1972) A10, A11

118 Cong. Rec. 302 (1972) A10

118 Cong. Rec. 4940 (1972) A12-A13

118 Cong. Rec. 4941 (1972) A13

TABLE OF AUTHORITIES (continued)

Page

Congressional Materials (continued):

118 Cong. Rec. 4942 (1972) A12, A13

118 Cong. Rec. 7168 (1972) 4, 22

118 Cong. Rec. 7569-70 (1972) A13

S. Conf. Rep. No. 92-681 (1972) A13

H.R. Conf. Rep. No. 92-899 (1972), reprinted in 1972 U.S.C.C.A.N. 2179 ..... A13

S. Rep. No. 92-415 (1971) A10

H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137 ..... A7

Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (1971) ... 10n, A8, A9

Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746, 92nd Cong., 1st Sess. (1971) A1, A2, A3, A4, A5

TABLE OF AUTHORITIES (continued)

Page

Briefs:

Brief on Behalf of the Chamber of Commerce of the United States, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) 13n

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Brief for United States Equal Employment Opportunity Commission as *amicus curiae*, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) 10n

Brief for United States Equal Employment Opportunity Commission as *amicus curiae*, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) 10n

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TABLE OF AUTHORITIES (continued)

Page

Briefs (continued):

Brief for the United States, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) 14

Brief for the United States, *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) 14-15

Brief for the United States, *Trout v. Lehman*, 702 F.2d 1094 (D.C. Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984) 11n-12n

Brief for the United States, *United States v. City of Warren*, 138 F.3d 1083 (6th Cir. 1998) ... 12n, 15

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT[1]

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

Summary of Argument

The petitioner and the United States as *amicus* ask this Court to interpret provisions of Title VII of the Civil Rights Act of 1964 (the "Act") in a way that is contrary to the express language of the statute as well as the legislative history of the Equal Employment Opportunity Act of 1972 (the "1972 Act"). This Court should reject this effort to override Congressional intent as well as Congressional action by limiting the scope of Title VII's continuing violation doctrine.

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[1]By letter to the Court dated July 26, 2001, the parties consented to the filing of *amicus curiae* briefs by any third party in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

By their express terms, sections 706(e)(1) and 706(g)(1) of the Act serve different functions—the former serves as an exhaustion mechanism to invoke the administrative process while the latter serves as a limit on the remedial authority of the court after a finding of unlawfulness. The continuing violation doctrine relates to both sections, in that both the question whether or not the administrative process was invoked in a timely manner as well as the scope of back pay relief can be affected by application of the doctrine.

The continuing violation doctrine as applied in cases under Title VII of the Civil Rights Act of 1964 was developed by the federal courts in 1965-72 during a period when there was no express statute of limitations applicable to remedies under Title VII. When Congress amended the Act in 1972, it recognized the absence of a statute of limitations and imposed a two-year cap on back pay, rather than allowing the courts to award damages in continuing violation cases back to the effective date of the Act—July 2, 1965—or to apply varying state statutes of limitations. At the same time, however, Congress endorsed case law that had developed interpreting certain violations as continuing in nature.

Both prior to and shortly after the passage of the 1972 Act, courts have, in the context of the continuing violation doctrine, treated the two-year period as a cap on back pay so long as the administrative process has been invoked in a timely fashion. This is consistent with the underlying policies of the Act—to assure that stale claims are not subject to processing by the administrative agency and the courts—while at the same time affording victims of ongoing patterns or policies of discrimination the fullest relief possible. This Court should not treat the administrative exhaustion requirement as a statute of limitations when neither Congress nor the courts (both prior and shortly after enactment of the 1972 Act) treated it as such. Rather, as the court below recognized, in the limited

circumstances where continuing violations exist, Title VII authorizes back pay relief up to two years prior to the filing of the charge, so long as the charge is otherwise timely filed. Nor is the defendant-employer prejudiced by issues of staleness. As this Court held in *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1981) the policy against staleness that underlies traditional statutes of limitations is satisfied by the continuing violation doctrine because some discriminatory act must occur or discriminatory policy exist within the charge-filing period.

The position advanced by the United States in this case is not only contrary to positions it has asserted before this Court and before many of the courts of appeals for nearly thirty years, but it is also directly contrary to existing federal regulations adopted by the Equal Employment Opportunity Commission and binding upon the federal agencies, including the Department of Justice. Those regulations provide that federal employees are entitled to recover back pay for two years prior to the filing of the administrative charge when they prove a continuing violation.

Finally, this Court should not engraft onto the Act a disqualification from relief for victims of discrimination who, knowingly or unknowingly, fail to file an administrative charge within 180 or 300 days of experiencing the first instances of a continuing course of discrimination. Imposition of such a disqualification was not a feature of the continuing violation doctrine prior (or immediately subsequent) to passage of the 1972 Act. If Congress were to determine that such a disqualification is appropriate, Congress can legislate such a provision. However, there is no such provision within the Act itself and such a disqualification would be directly contrary to the "make whole" purpose of the Act. "The scope of relief under . . . the Act is intended to make the victims of unlawful discrimination whole, and . . . requires that persons aggrieved . . . be so far as possible, restored to a position where they

would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting Section-by-Section Analysis by Senator Williams related to the 1972 Act, 118 Cong. Rec. 7168 (1972)).

Disqualifying a plaintiff from full relief under the continuing violation doctrine based upon when the plaintiff knew or should have known of the discriminatory nature of the employer's conduct is unnecessary to protect an employer against "stale" claims. This is because the continuing violation doctrine under Title VII requires that a timely charge be filed with the EEOC in order to obtain relief. There is, then, no issue of staleness, and no need for an "inquiry notice" test. Because the continuing violation doctrine applies only to those limited instances where an employer engages in a pattern or policy of discrimination, or a series of related discriminatory acts, the employer has readily the means to relieve itself from the reach of the doctrine—the employer need only stop violating the law. To penalize a plaintiff for not seeking to invoke the administrative process at the earliest instances of what turns out to be a continuing course of discrimination places the burden of stopping discrimination upon the victim of discrimination. That burden is more appropriately assigned to the wrongdoer—the employer who is violating the law by maintaining a policy of discrimination or engaging in a pattern or series of discriminatory acts.

ARGUMENT

I. THE TEXT AND LEGISLATIVE HISTORY OF THE TWO-YEAR BACK PAY LIMIT IN SECTION 706(g)(1) DEMONSTRATE THAT THE 1972 AMENDMENTS TO TITLE VII CODIFIED A CONTINUING VIOLATION DOCTRINE THAT PERMITS RECOVERY OF BACK PAY TWO YEARS PRIOR TO FILING THE CHARGE.

The decision of the Court of Appeals in this case properly applies the continuing violation doctrine endorsed by Congress in its 1972 amendments to Title VII of the Civil Rights Act of 1964. In contrast, the decision of the district court, and the brief for petitioner before this Court, rest on a fatally flawed premise: that the charge filing period in section 706(e)(1)[2] (in this case 300 days) precludes a court from providing any remedy for violations of Title VII occurring prior to that period. That interpretation of section 706(e)(1) cannot be reconciled with the existence of section 706(g)(1),[3] which

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[2] Section 706(e)(1) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . .

42 U.S.C. § 2000e-5(e)(1).

[3] Section 706(g)(1) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such

establishes for back pay awards an express and considerably longer two-year limitation period.

If section 706(e)(1) itself established the anterior temporal limitation on the Title VII violations that could be redressed, it would bar back pay awards for losses that occurred more than 300 days before the filing of the charge. Such a 300-day cutoff, however, would render meaningless the two-year cutoff provision of section 706(g)(1).

In an effort to avoid this implausible conclusion, the United States suggests that the two-year back pay limit was adopted to limit monetary relief in cases in which the 300 (or in some cases 180) day charge-filing period was extended by equitable tolling. (Brief of United States, 25). But section 706(g)(1) would limit back pay in such cases only if the charge filing period were extended by equitable tolling for at least 14 (in deferral states more than 18) months.[4] Experience with enforcement of the Act suggests that this is highly unlikely to happen. The United States has not identified a single Title VII case in which this has occurred, either before or after the 1972 amendments. This is not the circumstance that would have prompted Congressional action.

In the alternative, the United States urges that the two-

> affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

42 U.S.C. § 2000e-5(g)(1).

[4]The charge filing period is usually 6 months (180 days) in non-deferral states and 10 months (300 days) in deferral states.

year limit was adopted to limit back pay awards in pattern or practice cases brought by the Department of Justice. (Brief of United States, 25). But the 1972 legislation stripped the Department of responsibility for most such cases, transferring it to the EEOC, which in turn is only authorized to bring a civil action in response to a timely-filed Title VII charge. 42 U.S.C. § 2000e-6(c).

The far more reasonable interpretation of the statute is that section 706(e)(1) constitutes an exhaustion requirement, not a statute of limitations. Where an ongoing violation continues into the charge filing period, the requirements of section 706(e)(1) itself are met; the temporal limitation on the back pay period is provided by section 706(g)(1) rather than by section 706(e)(1). The legislative history of section 706(g)(1) makes clear that this interpretation is precisely how Congress understood the two-year back pay limit when it was adopted in 1972.[5]

The two-year back pay provision of section 706(g) has its origins in the continuing violation doctrine, which by 1971 was fairly well established in the lower courts.[6] Early decisions

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[5]Because the National Labor Relations Act has no analogous two-year back pay cap, petitioner's reliance upon that statute as authority (Brief of Petitioner, at 23-25) is misplaced. The two-year cap in Title VII was not modeled on the National Labor Relations Act.

[6]*E.g.*, *Mixson v. Southern Bell Tel. & Tel. Co.*, 334 F. Supp. 525, 527 (N.D. Ga. 1971)("if the alleged unlawful employment practice is continuous in nature, the 90-day limitations period for filing with the EEOC does not apply since there is no single date after which the period might begin to run"); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145, 1153 (E.D. Va. 1970) ("an allegation to the Commission of continuing discrimination can [bring] events which occurred before the prior ninety days to the Commission's attention."); *Watson v. Limbach Co.*, 333 F. Supp. 754 (S.D. Ohio 1971) (August, 1968 charge was timely basis to challenge August, 1967 rejection for hire in light of continuing use during charge

assumed that the only limitation in Title VII itself was the effective date of the statute, July 2, 1965.[7] There were in pre-1972 decisions repeated references to "continuing violations," and most participants in the legislative process read these cases to mean that Title VII itself contained no back pay limitations period. That proved to be an accurate understanding of those cases;[8] the lower courts ultimately divided as to whether the back pay for pre-1972 Title VII actions should be limited by the

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filing period of discriminatory hiring test); *Tippett v. Liggett & Myers Tobacco Co*, 316 F. Supp. 292 (M.D.N.C. 1970) (Females adversely impacted by actions in July, 1965 entitled to relief on basis of EEOC charges filed May, 1968 in light of showing that violation was continuing in nature).

[7]*E.g., Meat Cutters v. Safeway Stores, Inc.*, 4 FEP Cas. 510, 512 (D. Kan. 1972) ("The effective date for awarding back pay in this case would be the effective date of Title VII on July 2, 1965"). The United States asserts that two lower court cases had held that the charge filing period limited the scope of back pay even in the case of a continuing violation: *United States v. Georgia Power Co.*, 1971 WL 162 *27, 3 FEP Cas. 767 (N.D. Ga. 1971); *Johnson v. Goodyear Tire & Rubber Co.*, 349 F. Supp. 3, 18 n.8 (S.D. Tex. 1972). (Brief of United States, 25) However, in neither case did the court consider the continuing violation doctrine, and in *Georgia Power*, 3 FEP Cas. at 788-89, the court held that the Department of Justice could not obtain back pay in a pattern or practice case. Had this rule of law not have been reversed on appeal, there would have been no need for a back pay cap on suits brought by the United States. Neither of these cases supports the government's position here.

[8]*E.g., United States v. Georgia Power Co.*, 474 F.2d 906, 922 (5th Cir. 1973) ("Though private complaints must be filed before the EEOC within 90 days, we cannot agree with the company that this period is the proper measure. This deadline is designed primarily to enhance the possibility of informal, out-of-court resolution of employment discrimination complaints through prompt administrative action. It is in no sense a limitation on the period for which one may receive back pay relief. Employment discrimination may as readily be a continuing course of conduct as a single event.").

effective date of the Act[9] or the most analogous state limitations period.[10] The United States itself asserted, in a number of cases, that Title VII had no statute of limitations and that the scope of relief was determined by either the effective date of the act or by borrowing state law, not the charge-filing period.[11] The government's assertion in its brief in this case,

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[9]*E.g., Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233-34 (4th Cir. 1975) (awarding back pay to July 2, 1965 on basis of EEOC charge filed May, 1967); *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1147, 1150 (D. C. Cir. 1978) *aff'd in part, rev'd in part on other grounds sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (relief afforded from July 2, 1965 based on EEOC charge filed May 31, 1970).

[10]*E.g., Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1093-94 (D.C. Cir. 1984) (in absence of federal limitations period, borrowing Minnesota statute of limitations for Title VII claim brought by private plaintiffs prior to 1972); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 468-69 (D.C. Cir. 1976) (providing for the application of the analogous state statute of limitations to award of back pay in suit brought by private parties under Title VII); *EEOC v. Enterprise Ass'n Steamfitters*, 542 F.2d 570, 590 (2d Cir. 1976) (borrowing New York state statute of limitations to private and governmental lawsuits filed under Title VII in 1971); *EEOC v. Detroit Edison*, 515 F. 2d 301, 315 (6th Cir. 1975) (borrowing Michigan limitations period for Title VII action brought by private and United States plaintiffs); *Franks v. Bowman Transp. Co.*, 495 F. 2d 398, 405 (5th Cir. 1974) (applying Georgia statute of limitations for back pay relief in private Title VII action); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, 258 (5th Cir. 1974) (borrowing Alabama statute of limitations in private Title VII action); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1378 (5th Cir. 1974) (rejecting argument that 90-day charge filing period was a limitation on relief, court borrowed Texas statute of limitations for private suit under Title VII).

[11]In January, 1972, just prior to passage of the 1972 Act, the EEOC asserted that "no court has heretofore imposed a time limitation on the relief available to rectify the continued impact of discrimination, other than the effective date of Title VII, July 2, 1965." Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 5, *King v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (No. 71-3293); *See also*

that the "traditional" continuing violations doctrine does not authorize relief for actions occurring prior to the charge-filing period (Brief of United States, 12), is contrary to the legislative history, substantial court authority both before and shortly after the 1972 Amendments and the government's own position in numerous litigated cases.

The legislative history of the two-year back pay limitation is set out in detail in Appendix A. The legislative history demonstrates that Congress intended to incorporate a two-year cap on back pay liability, using as models the statutes of limitations found in the Fair Labor Standards Act, the Walsh-Healy Act, the Bacon-Davis Act and the Equal Pay Act.[12] The impetus for the incorporation of the cap was then-developing case law and the position of the federal government that Title VII itself did not contain any limitations period and that an employer's back pay liability extended back to the

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Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 13, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (No. 73-1712) (arguing that it was error to apply 90-day charge filing period as a limitations on back pay recovery in Title VII action brought by private plaintiffs); Brief for United States Equal Employment Opportunity Commission as *amicus curiae* at 43, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (No. 73-1163) (arguing that Alabama's one year statute of limitations was applicable to Title VII back pay claim in private plaintiffs' action).

[12]Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746, 92nd Cong., 1st Sess. 281 (1971) ("House Hearings"); Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess.. 360-61 (1971) ("Senate Hearings") (statement of Gerard Smetana). See Appendix A, attached, at A1-2, A5, A9.

effective date of the Act—July 2, 1965.[13]

The assertion of the United States in this case that the two-year cap was designed for very limited circumstances (situations of equitable tolling and/or Department of Justice pattern or practice cases) (Brief of United States, 25) is not supported by the legislative history. That history contains repeated statements of concern by various members of Congress that a back pay cap was necessary to remedy the potential exposure of employers to the award of back pay from July 2, 1965. That concern was much broader than the United States has suggested here. *See, inter alia*, testimony of Congressman Ellenborn (Appendix, A3-4, A8) and Senator Beall (Appendix A11).

In sum, Congress adopted the two-year rule with the understanding that Title VII contained no anterior limitation on back pay awards other than the effective date of the statute. That was a correct reading of caselaw both before and after 1972. Against that background members of Congress repeatedly expressed their understanding that section 706(g)(1) would constitute the statute of limitations in Title VII cases. (Appendix A3, A5-7, A10). The Department of Justice, disavowing the position it has taken for nearly three decades,[14]

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[13] *See, e.g.*, the testimony of William H. Brown, Commissioner of the Equal Employment Opportunity Commission, that employers faced back pay liability from July 2, 1965, without limitation. (Appendix, A2).

[14] Contrary to its position here, the United States has repeatedly asserted that the continuing violation doctrine authorizes relief for discriminatory acts occurring prior to the charge-filing period, with a cap of two years on back pay recovery. *See, e.g.*, Brief of the United States at 50-51, *Trout v. Lehman*, 702 F.2d 1094 (D.C. Cir. 1983) (Nos. 81-2370, 82-1305), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984) ("The 'continuing violation' doctrine provides a limited exception to the time limitations embodied in Title VII. A plaintiff may recover for

apparently insists that this interpretation was mistaken, that the charge-filing period has always been the limit on back pay, and that Congress intended that in all but exceptional cases the anterior limit would be either 180 or 300 days. It is, however, far too late to revisit the assumptions on which the 1972 legislation was based, or to litigate whether the caselaw which prevailed in that era, and which the chairman of the EEOC expressly brought to the attention of Congress, was in error. "Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act." *Brown v. General Services Administration,* 425 U.S. 820, 828 (1976).

In the 1972 Act, Congress dealt with two different time periods. It increased the time period for invoking the administrative process and it imposed a two year cap on back pay relief. In so doing, it expressly endorsed existing case law which treated some violations as continuing in nature, and further stated, in the authoritative Section-by-Section analysis by Senator Williams, that in so amending Title VII, existing case law treating certain types of violations as continuing in nature were "not affected." (Appendix, A12). That is, the charge-filing period was not to be treated as a bar to relief in cases involving continuing violations, as the courts had not treated it as a bar in cases predating the 1972 Act.

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discrimination which occurred outside the relevant time period, if that discrimination was part of a policy or practice of discrimination which continued into the relevant time frame. *E.g., Jewett v. ITT Corp.*, 653 F.2d 89, 91-93 (3rd Cir. 1981); *Milton v. Weinberger*, 645 F.2d 1070, 1075-77 (D.C. Cir. 1981); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 725 n.73 (D.C. Cir. 1978)."); *See also* Brief of United States at 28, *United States v. City of Warren*, 138 F.2d 1083 (6th Cir. 1998) (Nos. 97-1024, 97-1075).

II. THE INTERPRETATION OF TITLE VII NOW ADVANCED BY THE SOLICITOR GENERAL WOULD INVALIDATE EXISTING FEDERAL REGULATIONS AND DIRECTIVES.

The Solicitor General has in the instant case asserted that (except in exceedingly rare situations) it is the section 706(e)(1) charge-filing period, not section 706(g), which controls the starting date for back pay calculations. (Brief of United States, 25). The United States acknowledges that this represents a repudiation of the longstanding position of the EEOC (Brief of United States, 23); it is also at odds with the generally accepted view of the law and the position the government has advanced for nearly three decades.[15]

In *Brown v. General Services Administration,* 425 U.S. at 828 n.10, the plaintiff urged that federal employees should be permitted to bring employment discrimination claims under statutes other than Title VII. In opposing that contention, the United States advised this Court that in a Title VII action the commencement of the back pay period would be controlled by

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[15]Even defendant-employers filing *amicus* briefs in this Court have repeatedly insisted that the two-year rule in section 706(g) (1) governed the beginning of the back pay period. *See, e.g.,* Brief on Behalf of the Chamber of Commerce of the United States at 36 n.53, No. 74-389, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389) ("when an employer is charged with a Title VII violation, his potential liability for back pay extends backward two years prior to the date the charge is filed with the Commission. (section 706g)."); Brief of the Texas Association of Business at 12 n.16, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (No. 76-99) ("back pay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge"); *id.* at 17 n.29 ("Section 706(g) provides a limitation on back pay liability to two years prior to the filing of the charge.").

the two-year rule in section 706(g)(1).[16] The government objected that if federal workers could sue under statutes other than Title VII then "the district court may award back pay without regard to the two-year limit under Title VII."[17]

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), the Solicitor General, in urging that the EEOC could bring an action more than 180 days after the filing of a charge, assured the Court that even where the EEOC delayed filing suit the magnitude of the total back pay award would be limited because "Congress has expressly limited employers' liability for back pay to two years of a charge's filing."[18]

In its brief in the instant case, the government insists that this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), did not adopt a continuing violation doctrine for cases under the Fair Housing Act, and thus provides no support for such a doctrine in Title VII cases. (United States Brief, 18). But in *Havens Realty* itself the Solicitor General urged the Court to adopt a continuing violation rule, and to do so precisely because that rule already existed in Title VII cases. (Brief for the United States, No. 80-988, pp. 9-10 n.9.). And in *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), the United States characterized *Havens Realty* as having adopted a continuing violation doctrine that

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[16]Brief for Respondents, No. 74-768, at 17-18 ("Section 706(g) authorizes the district court . . . to grant . . . back pay for a period not to exceed two years prior to the filing of the initial administrative complaint.").

[17]*Id.* at 19.

[18]Brief for the EEOC, No. 76-99, at 39 (quoting *EEOC v. Kimberly-Clark Corp.*, 511 F. 2d 1352, 1358 n. 9 (6th Cir. 1975)).

should be applied to Title VII cases. (Brief for the United States, No. 87-1428, p. 12.).[19]

Only four years ago the Department summarized the origins of the two-year back pay rule as follows:

> As originally enacted, in 1964, Title VII contained no explicit limitation on back pay. For actions filed before the 1972 amendments to Title VII, courts therefore applied the most analogous state statute of limitations to claims for back pay under the Act. . . . . When Congress amended Title VII in 1972, it added Section 706(g). . . . In *Albemarle*, . . . the Supreme Court noted that in enacting the amendments in 1972, Congress rejected a provision that would have limited an employer's back pay liability to two years prior to the filing of a complaint in court.

(Brief for the United States at 28, *United States v. City of Warren*, 138 F.2d 1083 (6th Cir. 1998) (Nos. 97-1024, 97-1075). Yet in this Court the government insists the adoption of section 706(g)(1) is of no real consequence to Title VII limitations.

Most significantly, the position of the Solicitor General conflicts with the regulations governing administrative complaints of employment discrimination by federal agencies, 29 C.F.R. part 1614, and with Management Directive 110. The government urges this Court to adopt an interpretation of Title VII under which its own regulations, and Management

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[19]Quite plainly, this Court in *Havens Realty* did permit recovery for acts prior to the start of the charge-filing period. Although all claims of plaintiff Coleman were prior to the charge-filing period, this Court concluded that the 180-day filing period "is no bar" because the claims of co-plaintiff Coles occurred within the 180-day period and the violation was a continuing one. *Havens Realty*, 455 U.S. at 380-81.

Directive 110, would necessarily be invalid. The approach taken by the Solicitor General is precisely backwards; the presumptive validity of the regulations and Management Directive 110 are of controlling importance in determining the correct interpretation of Title VII.

With regard to federal sector discrimination, the EEOC now exercises the government-wide rulemaking and adjudicatory authority originally accorded to the Civil Service Commission. Section 717(a) forbids the same discriminatory practices prohibited by section 703 of Title VII. Section 717(b) provides in part:

> [T]he Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate . . . . The head of each . . . department, agency or unit shall comply with such rules, regulations, orders and instructions.

42 U.S.C. § 2000e-16(b). With regard to federal sector discrimination, therefore, section 717(b) authorizes the EEOC to issue legislative regulations and orders and those regulations and orders not only constitute a permissible interpretation of the remedial provisions of Title VII itself but also embody interpretations of Title VII which are entitled to deference under *Chevron U.S.C. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Management Directive 110 instructs federal agencies regarding the manner in which they are to handle administrative complaints of discrimination. The regulations require aggrieved employees or applicants to contact an EEO counselor within 45 days of the alleged discrimination. 29 C.F.R. § 1614.105(a). Management Directive 110 provides that federal

agencies—including, of course, the Department of Justice—must apply a continuing violation doctrine in determining the scope of relief to be awarded for proven discrimination.

> [I]ncidents that occurred outside the 45-day time limit should be investigated and remedied to the extent that they are sufficiently interrelated to a timely raised incident such that a continuing violation has been established. A continuing violation is a series of related acts, one or more of which falls within the limitations period, that are tied together with a common theme uniting the alleged discriminatory acts into a continuous pattern. When determining if a continuing violation exists, the following information is relevant to, but not necessarily dispositive of, the issue: whether the same officials were involved in the incidents, whether the incidents were similar in nature, and whether they recurred or were of a more isolated nature.

(Management Directive 110, Ch. 5, part III(A) (3)); *see* http://www.eeoc.gov/federal/md110.html). If, for example, a worker within the Department of Justice were to file a complaint of salary discrimination, Management Directive 110 would compel the Attorney General to utilize this continuing violation doctrine in determining the period for which relief was required.

The Commission's federal sector regulations impose the same obligation. An individual who demonstrates that he or she was the victim of discrimination is entitled to "[p]ayment . . . on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination." 29 C.F.R. § 1614.501(a) (4). The only limitation on this make whole obligation is the two-year back pay rule. "[B]ack pay liability

under Title VII . . . is limited to two years prior to the date the discrimination complaint was filed." *Id.* at § 1614.501(c)(1).

The regulations provide that an administrative "complaint" is the equivalent of a Title VII charge. 29 C.F.R. §§ 1614.407 (time period for filing suit), 1614.501(c) (1) (date from which back pay limit is calculated.). The regulations structure the complaint filing process in a manner which utterly precludes any possibility that the time limit for filing an administrative complaint could define the period of time for which pre-complaint backpay or other relief could be awarded. The deadline for filing a complaint is only 15 days—unimaginably short as a limitation period, and only one twentieth of the 300 day charge-filing period—and the deadline runs from the end of counseling, not from the occurrence of a discriminatory practice. 29 C.F.R. § 1614.106(b).

The regulations regarding class complaints are equally clear. Once there has been a finding of the existence of a class-wide discriminatory policy or practice, "[r]elief otherwise consistent with this Part may be ordered for the time the policy or practice was in effect." 29 C.F.R. § 1614.204(l)(3). The only back pay relief that would not be inconsistent with a provision of part 1614 would be back pay extending more than two years prior to the filing of the class complaint. See 29 C.F.R. §§ 1614.501(b) (3), 1614.501(c)(1).

In promulgating these regulations, the EEOC has made clear that they embody the continuing violation doctrine also codified in Management Directive 110. Although the regulations require a discrimination victim to contact an EEO counselor within 45 days, that abbreviated time period does not limit the relief that can be accorded for a continuing violation.

> Under the continuing violation theory . . . incidents occurring earlier than 45 days before contact with the counselor must also be remedied provided that the initial contact with the counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. That is, where contact with the counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation.

64 Fed. Reg. 37653 (1999). Similarly, 29 C.F.R. § 1614.204(l) (3) requires a class agent to prove the existence of a discriminatory practice or policy in existence within 45 days of the initial contact with an EEO counselor. But once discrimination within that period has been shown, monetary relief is available for the full two-year period. "[T]he 45-day time limit in section 204(l) (3) defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member." 64 Fed. Reg. 37653 (1999); see 57 Fed. Reg. 12644 (1992).

III. DISQUALIFYING A PLAINTIFF FROM FULL RELIEF FROM A CONTINUING VIOLATION ON THE BASIS OF WHEN THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF THE DISCRIMINATORY NATURE OF THE EMPLOYER'S UNLAWFUL CONDUCT IS NOT SUPPORTED BY EITHER THE LANGUAGE OF THE ACT OR ITS LEGISLATIVE HISTORY.

Both the petitioner and the United States propose that this Court impose upon Title VII's continuing violation doctrine a disqualification from relief based upon the date when a victim of a continuing pattern or practice of discrimination first appreciates the discriminatory nature of his/her employer's conduct. (Brief of United States, 17; Brief of Petitioner, 40-

44). A number of court of appeals have adopted such tests. *See, e.g., Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983) (Does the act "have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights. . . ."); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (Did the plaintiff have "no reason to believe he was a victim of discrimination. . . ."); *Sabree v. United Brotherhood of Carpenters & Joiners*, 921 F.2d 396, 402 (1st Cir. 1990) ("What matters is whether, when and to what extent the plaintiff was on inquiry notice."). However, some courts still apply the continuing violation doctrine without imposing such a disqualification. *See, e.g., Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (applying three-part test of *Baker v. F & F Investment Co.*, 489 F.2d 829, 836 (7th Cir. 1973)).

The Act itself contains no provision articulating such a limitation. Nor was such a test included in the initial Title VII continuing violation doctrine adopted by the courts prior to the 1972 Amendments. *See, e.g.*, cases cited *supra*, n.6. Indeed, the court of appeals cases applying the continuing violation doctrine throughout the 1970s and early 1980s did not include a test of whether or not the plaintiff had knowledge (or should have had knowledge) of the discriminatory nature of the employer's practices at the plaintiff's earliest exposure to that unlawful activity.[20] Nor is such disqualification a part of the

[20] *E.g., Guardians Ass'n of New York City v. Civil Serv.Comm'n*, 633 F.2d 232, 237-38, 247-51 (2d Cir. 1980), *aff'd* 463 U.S. 582 (1983) (providing relief for discriminatory acts occurring prior to the 300-day charge-filing period in case challenging City's use of discriminatory employment tests without inquiry into plaintiff's knowledge); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1082, 1087 (4th Cir. 1977) (In challenge to discriminatory promotion system, court affirmed award of back pay starting in 1967 on basis of EEOC charges filed in 1969 without a test of plaintiff's earlier knowledge); *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir. 1980) (holding that back pay accrued from two years prior to the charge for actions preceding the two-year cap so long as current violation was shown; no inquiry into plaintiff's knowledge of discriminatory nature of defendant's practices); *Hall v. Ledex*, 669 F.2d 397, 398 (6th Cir. 1982) (Upon showing of continuing violation, court properly awarded back pay for promotion action occurring in April, 1974, more than 300 days prior to filing of charge on May 9, 1975; no inquiry into what plaintiff knew or should have known); *Patterson v. Youngstown Sheet & Tube Co.*, 659 F.2d 736, 740 (7th Cir. 1981) (applying two-year limitation on back pay to private plaintiff's challenge to continuing discriminatory promotion system; no test of plaintiff's prior knowledge of discrimination); *Williams v. Owens-Illinois*, 665 F.2d 918, 924 (9th Cir. 1982) (Upon showing of a continuing discriminatory policy in promotions and job placements, plaintiffs were entitled to "base claims" upon discriminatory acts occurring prior to charge-filing period; no inquiry into plaintiff's prior knowledge); *Rich v. Martin Marietta*, 522 F.2d 333, 348 (10th Cir. 1975) (rejecting application of 90-day charge-filing period rather than two-year period as limit of relief for continuing violation of act in promotion case brought by private plaintiff; no test of plaintiff's prior awareness of discrimination); *Stallworth v. Schuler*, 777 F.2d 1431, 1435 (11th Cir. 1985) (affirming award of back pay for two years prior to EEOC charge for high school principal's claim of continuing pattern of discrimination in promotions; no test as to plaintiff's notice); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 723-26 (D.C. Cir. 1978) (employer's continuous campaign of negative references, beginning after termination of plaintiff's employment in 1968 constituted continuing violation for which relief could be granted based upon 1973 EEOC charge; no inquiry into plaintiff's prior awareness of discriminatory nature of defendant's conduct).

continuing violation test adopted by this Court in *Havens Realty*.

The engrafting of such a barrier to relief onto the statute is inconsistent with Congressional purpose. Such a requirement is directly contrary to the "make whole" purpose of the Act. As this Court has repeatedly observed, "the scope of relief under . . . the Act is intended to make the victims of unlawful discrimination whole. . . and requires that persons

aggrieved . . . be so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421 (quoting Section-by-Section Analysis by Senator Williams related to the 1972 Act, 118 Cong. Rec. 7168 (1972)). *See also Teamsters v. United States*, 431 U.S. 324, 364 (1977) ("An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' (citing *Albemarle Paper*, at 418)). In determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'" (citing *Franks v Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Further, the imposition of this additional test places upon the victim the cost of an employer's ongoing course of discriminatory conduct under the guise of protecting the employer from stale claims. However, because the continuing violation doctrine requires a timely charge, there is no issue of staleness, and there is no need otherwise to protect the employer against staleness. In the 1972 Act, Congress determined the extent to which a wrongdoer would be held liable for its unlawful conduct and settled upon a two-year limit for continuing violations. That is a legislative choice based upon a balancing of interests and is a choice that the federal courts should not alter.

The continuing violation doctrine applies only in limited circumstances. It does not apply to instances where an employer engages only in an isolated act of discrimination. Rather, it applies to those instances where an employer engages in a pattern or policy of discrimination, or a series of related discriminatory acts. In such circumstances, the employer has the means to relieve itself from the reach of the doctrine—the employer need only stop violating the law. To penalize a plaintiff for not invoking the administrative process at the

earliest instances of discrimination places the burden of stopping discrimination upon the victim of discrimination. That burden is more appropriately assigned to the wrongdoer—the employer. The doctrine, after all, applies only to an employer who is violating the law by continuing a discriminatory policy, or engaging in a pattern or series of discriminatory acts and has within its own power the ability to end its exposure to the doctrine by ending the unlawful discrimination.

Two courts of appeals have reached similar conclusions in considering the underlying purposes of the continuing violation doctrine. *Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981) ("Title VII advances important federal goals. To require that suit be filed at the first instance of discrimination or not at all would frustrate Title VII. Broad, remedial acts such as Title VII should be liberally construed to encourage the eradication of discrimination."); *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443, 445 (5th Cir. 1972) ("We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold on the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act of 1964.").

This Court should reject imposition of this inappropriate restriction upon relief under Title VII of the Civil Rights Act.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

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APPENDIX A

THE LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

The initial impetus for the two-year rule apparently came from employers.[1] At the March 1971 House hearings a witness appearing in connection with testimony of the American Retail Federation submitted a written statement containing language of a proposed amendment limiting back pay to a period beginning two-years prior to the filing of the complaint.[2] The accompanying explanation objected that the lack of any limitations period was unfair to employers.

> Unless a reasonable limitation is placed upon the ability of plaintiffs to recover past damages . . . frivolous and totally unnecessary lawsuits will be encouraged. The possibility of enormous monetary liability under Title VII, especially in view of the increased use of class-type suits, regardless of the actual liability of the charged party, is clear.[3]

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[1]See George T. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881 (1972).

[2]*Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746*, 92nd Cong., 1st Sess. 476 (1971)("House Hearings")("No order made hereunder by any court shall include back pay or other liability which has accrued more than two years before the filing of a complaint with said court under this Title.")

[3]House Hearings at 281.

A two-year limitations period, the statement explained, would be "consistent with provisions contained in the Fair Labor Standards Act, the Walsh-Healy Act, the Bacon-Davis Act and the Equal Pay Act."[4]

Representative Erlenborn raised the issue during the testimony of the chairman of the EEOC.

> Mr. Erlenborn. At what point is this back pay award determined and is there any statute of limitations as to how far back you can go in the back pay award?
>
> Mr. Brown. Under the court decisions we can go back to the beginning of the act.[5]

Erlenborn argued that the lack of a limitations period was wrong, and would become increasingly unfair in the future as the number of years since 1965 rose.

> It seems to me that this class action and back pay award, that whole thing, has grown by practice and court decisions, and Congress has not turned its attention to this sufficiently. Under the NLRB there are limitations as to how far back pay awards can be made, or at what point back pay liability attaches. It seems to me Congress ought to turn its attention to some similar limitations in this area . . . . Should we, because no charge is made until 1985, have the employer in 1985 be liable for back pay to 1965, or isn't it reasonable to have some statute of limitations?[6]

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[4] *Id.*

[5] *Id.* at 89.

[6] *Id.* at 89-90.

Chairman Brown defended the absence of a limitations period, arguing that "as the back pay awards grow . . . there is going to be a growing likelihood that we are going to be able to settle more cases."[7]

Representative Erlenborn in response reiterated his objections.

> [T]here could be come reasonable limitation as to how far back the liability attaches. Now, we are talking about 1985. We could be talking about the year 2000 or beyond, with the liability still running back to the day the statute was enacted, which seems to me a bit unreasonable. . . . [W]e should have a statute of limitations.[8]

The witness whose prepared statement had raised the issue strongly agreed with Erlenborn.

> I do propose a statute of limitations. I think the example that Chairman Brown gave in the colloquy with Congressman Erlenborn was a terrible one. If I think of Sears having to set up reserves up to the year 2000 because of possible liabilities, because in that year one could still go back to 1964, it would be a difficult situation to administer. So I would propose, as has worked under the Fair Labor Standards Act, then a 2-year statute of limitations, 2 years from the time a complaint is filed.[9]

---

[7] *Id.*

[8] *Id.*

[9] *Id.* at 284-85.

Representative Erlenborn repeated his earlier objections and disagreement with Chairman Brown.[10]

Several weeks later, Representative Erlenborn introduced H.R. 6760, which would ultimately be adopted by the House in place of the Committee bill. H.R. 6760 included a two-year back pay limitation that was identical to the language proposed at the earlier hearing:

> No order made hereunder shall include back pay or other liability which has accrued more than two-years before the filing of a complaint with said court under this title.

The United States Chamber of Commerce strongly endorsed this proposal.

> [P]ermitting back-pay awards to date from the effective date of the Act, July 2, 1965, until final settlement is simply an attempt to coerce employers and unions through the threat of enormous liability into waiving their rights to a fair hearing.
>
> In other areas of law in which liability attaches, an injured or aggrieved party must take reasonably prompt action to enforce his rights. Back-pay awards should not be used as a form of punishment. We therefore support the

[10] *Id.* at 286 ("The problem that I discussed with the Chairman of Equal Employment Opportunity Commission is the lack of a statute of limitations . . . [P]ersonal injury or property damage claims or almost any other kind of claim . . . all have a limitation through a statute of limitations or the doctrine of laches. It would seem to me there is no reason why the same sort of approach should not be used in the case of these back pay claims and class actions, which, unfortunately, at the present time, do not have any sort of limitations. I just can't buy Chairman Brown's position that in the year 2050 a claim can run back to 1964, and I think that Congress should turn its attention to this problem.")

> amendment . . . contained in H.R. 6760 to set a two-year limit on back-pay liability. This provision, modeled upon the limitations contained in the Fair Labor Standards Act, is neither unreasonable with respect to the liability of a respondent nor burdensome upon a complainant.[11]

When the full committee took up the bill in May of 1971, however, it approved H.R. 1746, sponsored by Representative Hawkins, rather than H.R. 6760, and rejected a proposal to add a two-year limitation to H.R. 1746 itself.

Over the course of the summer of 1971 Representative Erlenborn and others lobbied members of the House to support H.R. 6760 (also reintroduced as H.R. 9247)[12] when it was offered as a substitute for H.R. 1746. In July Erlenborn placed in the Congressional Record an explanation of his proposal:

> As indicated in testimony before the House General Labor Subcommittee by EEOC Chairman Brown, remedies for discriminatory acts may reach back to the effective date of the Act, July 2, 1965. Arguments that the threat of enormous back pay liability will encourage conciliations are simply attempts to coerce employers and labor organizations into surrendering to the administrative process fundamental rights to a fair hearing and due process of law. Back pay awards should measure compensation, not punishment. Section 706(f) has been amended by the bill to limit liability to two-years preceding the filing of a complaint in court, following the pattern of the minimum wage law.[13]

[11] *Id.* at 476.

[12] The two-year limitations provision of H.R. 9247 was identical to that in H.R. 6760.

[13] 117 CONG. REC. 26555 (1971).

These repeated objections to the lack of a limitations period in Title VII evidently generated considerable opposition to the Hawkins bill. At the beginning of House debate on the legislation, Representative Dent offered on behalf of the supporters of H. R. 1746 an amendment that would have limited the retrospective reach of back pay to two-years before the filing of the charge with the EEOC.[14] Congressman Dent explained that the

> amendment would impose a 2-year "statute of limitations" on the awarding of back pay and reinstatement under [T]itle VII. Thus, if the EEOC or, in the case of an individual action, the Court, found that an unlawful employment practice existed, back pay liability could not be extends [*sic*] further than 2 years from the time the charge was filed with the Commission.[15]

Other supporters of H.R. 1746 also described the amendment as establishing a "statute of limitations."[16] This amendment was required, according to Dent, because under Title VII as originally enacted back pay awards could reach back to July, 1965.

> Today you go back to the date of the passage of the act and you could very easily create an injustice greater than the justice you were giving or trying to give. So we have a

---

[14]"No order made hereunder shall include back pay or reinstatement liability which has accrued more than two-years before the filing of a charge with the Commission." 117 CONG. REC. 31784 (1971) (remarks of Rep. Dent).

[15]117 CONG. REC. 31784 (1971) (remarks of Rep. Dent).

[16]117 CONG. REC. 31961 (1971) (remarks of Rep. Perkins).

statute of limitations.[17]

The difference between the Dent proposal and the language in the Erlenborn bill was of considerable importance, because--as was repeatedly stressed during the hearings and debates--in this era the average Title VII charge was pending at the EEOC for some 20 months.[18]

Representative Erlenborn reiterated his earlier criticism of the lack of a limitations period in Title VII. Class actions, he warned,

> plus the liability of back pay without limitation, would create an horrendous potential liability. We would provide a limitation on liability through a 2-year statute of limitations. I would admit that the majority . . . has said, belatedly, that if they are given the opportunity, they would also apply a 2-year statute of limitations.[19]

Several members of the House expressed agreement with the position of Chairman Brown that back pay should continue to run (where the discriminatory practice was that old) from the effective date of Title VII. Representative Stokes denounced the Erlenborn proposal as a scheme to "minimize damage awards against discriminating employers and unions . . . a great leap backward in our struggle for equal employment opportunity."[20] Representative Abzug explained that she disagreed with even the Dent proposal, but was willing to

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[17]117 CONG. REC. 31979 (1971) (remarks of Rep. Dent).

[18]*See, e.g.*, H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2170-71 (Minority Views).

[19]117 CONG. REC. 31973 (1971) (remarks of Rep. Erlenborn).

[20]117 CONG. REC. 32106 (1971) (remarks of Rep. Stokes).

accept it if necessary to win passage of the rest of H.R. 1746[21].

The most controversial difference between the Hawkins and Erlenborn proposals concerned what type of enforcement authority to give to the EEOC. Under H.R. 1746 the Commission would have been given the power to issue cease and desist orders to be enforced, like orders of the NLRB, by the courts of appeals. H.R. 6760, on the other hand, would have authorized the EEOC to bring civil actions in federal district court, the type of enforcement mechanism ultimately adopted. After a debate that focused primarily on this issue, the House voted by a narrow margin to adopt the Erlenborn bill as a substitute for the Hawkins bill that had been reported by the committee.

In the Senate hearings which followed, the key House proponents of a two-year limitation renewed their arguments. Representative Erlenborn described Chairman Brown's House testimony "that the EEOC's position is that remedies, including back pay, may reach back to the effective date of the Act, July 2, 1965. Although it is not clear, indications are that the courts have held similar positions."[22] Erlenborn explained that the House-passed bill "imposes a limitation on liability. A similar limitation exists in the National Labor Relations Act and the Fair Labor Standard[s] Act. This limit on liability would be 2 years prior to the filing of the complaint with the court."[23] The American Retail Federation complained that S. 2515, which had been proposed by Senator Williams, did nothing to address

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[21]117 CONG. REC. 32097 (1971) (remarks of Rep. Abzug).

[22]*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 1st. Sess. 189 (1971) ("Senate Hearings.")

[23]Senate Hearings at 173.

the lack of a statute of limitations under Title VII.

> S. 2515 makes no provision whatever for any limitation upon recovery. This failure is wholly inconsistent with provisions contained in the Fair Labor Standards Act, the Walsh-Healy Act, the Davis-Bacon Act, and the Equal Pay Act. The result is that an unknown or inadvertent violation of the Act could permit a recovery to the effective date of the Act. Thus, for example, in the year 2000 suit could be filed seeking recovery back to 1965. Assuming the number of plaintiffs were large enough and the cause were meritorious, it is doubtful that any company or union in the United States could survive the amount of the judgment.
>
> Experience with liability limitation standards have in other comparable areas led to rapid settlement and greater uniformity of compliance with statute's requirements. . . . A two-year statute of limitations also should have the statutory effect of diminishing agency backlog.[24]

The United States Chamber of Commerce also objected to continuing to permit back pay awards to run from July 2, 1965.[25]

In the Senate committee a consensus was reached in favor of a two-year back pay limitation, and S. 2515 was amended in

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[24]Senate Hearings at 360-61 (statement of Gerard Smetana).

[25]Senate Hearings at 496 ("permitting back-pay awards to date from the effective date of the act, July 2, 1965, until final settlement is simply an attempt to coerce employers and unions through the threat of enormous liability into waiving their rights to a fair hearing. In other areas of law in which liability attaches, an injured or aggrieved party must take reasonably prompt action to enforce his rights. Back-pay awards should not be used as a form of punishment. We therefore support the amendment to . . . set a two-year limit on back-pay liability.")

committee to bar back pay awards accruing more than two-years prior to the filing of the EEOC charge.[26] The limitation in the committee bill, however, applied only to orders issued by the EEOC, and did not limit judicial awards in cases litigated in federal court.[27]

In the legislative process that followed, both supporters of S. 2515, and those who preferred the House bill, consistently referred to the two-year rule (not the charge filing period) as establishing the retrospective limit on back pay. Although under S. 2515 the EEOC could adjudicate Title VII claims, the Senate Report explained, "[i]n issuing its order, the Commission, in any situation involving back pay, would be limited to an award of two-years prior to the date of the filing of the charge with the Commission."[28] Senator Dominick, although opposing the provision in S. 2515 authorizing EEOC to award back pay, approved its provision for "a 2-year limitation of back pay liability."[29] Senator Williams placed in the Congressional Record an analysis of the Committee bill which noted that "[a]n award of back pay is not to exceed that which has accrued more than two-years prior to the filing of a charge with EEOC."[30]

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[26]118 CONG. REC. 1071 (1972) (remarks of Sen. Beall).

[27]S. REP. No. 92-415 at 58 (1971).

[28]S. REP. No. 92-415 at 20 (1971); *see id.* at 38 ("back pay liability is limited to two-years prior to the filing of a charge with the Commission").

[29]117 CONG. REC. 39739 (1971) (remarks of Sen. Dominick on Amendment 611); *see* 118 CONG. REC. 302 (1972) (remarks of Sen. Dominick) (his amendment does not affect "the 2-year limitation of back pay liability.").

[30] 118 CONG. REC. 1071 (1972) (remarks of Sen. Williams).

The extended Senate debates which followed, like the House debates, centered on whether to give the EEOC cease and desist authority. Opponents of that proposal favored a substitute bill offered by Senator Dominick. Although Dominick assumed that a two-year back pay limitation was in his bill, that limitation was inadvertently omitted. Eventually Senator Beall, a supporter of S. 2515, pointed out that omission, and offered an amendment to the Dominick bill that was accepted by Dominick and approved unanimously.[31] The Dominick bill did not permit the EEOC to make back pay awards; the Beall amendment applied to judicial awards and (like the Dent amendment) ran from the date on which the charge was filed. The language of the brief debate reflected the Senate consensus about the length of the pre-charge period for which back pay could fairly be awarded.

> MR. BEALL. . . . [S]hould there be a finding in favor of the plaintiff in one of these cases, we want to make sure that the penalty is within the balance of fairness. In the committee, there was an agreement that should there be a finding, any award of back pay liability should not go back further than 2 years prior to the time that the charges were brought before the Commission.[32]

After extended debate a compromise was agreed upon by Williams, Dominick, and their supporters. Under the compromise proposal regarding back pay, awards were limited to the period beginning two-years prior to the filing of the charge with the EEOC. Without objection, Senator Williams placed in the Congressional Record a detailed section-by-

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[31]The language of that amendment, like the final bill, limited back pay to amounts accruing less than two-years before the filing of the Title VII charge. 118 CONG. REC. 1071 (1972)

[32]*Id.*

section analysis of the final compromise language. Williams described only the two-year rule, not the modified charge filing period, as limiting the amount of back pay.

> The court's award of back pay is limited to that which accrues from a date not more than two-years prior to the filing of a charge with the Commission. . . . The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the act is intended to make the victims of unlawful discrimination whole, and . . . so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. The broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill.[33]

The bill also increased the charge filing period to 180 days, or 300 days in a deferral state. The explanation of the modified charge filing period was consistent with this account of the two-year back pay rule.

> In establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued.[34]

[33] 118 CONG. REC. 4942 (1972) (remarks of Sen. Williams just before final passage).

In the conference which followed, the critical relevant difference between the House and Senate bills was that under the Erlenborn substitute the two-year period ran from the date on which the complaint was filed in court, while in the Senate version that period ran from the filing of the charge with the EEOC. That difference was resolved in favor of the Senate version. The Conference Report explained:

> The court is authorized to award back pay except that such back pay liability is limited to that which accrues from the date not more than two years prior to the filing of a charge with the Commission.[35]

When he reported the conference bill to the Senate, Senator Williams again placed in the Congressional Record a section-by-section analysis. That analysis contained an explanation of the two-year limitation rule and the new charge filing period, and an endorsement of the continuing violation doctrine, that was identical to his earlier section-by-section analysis.[36] In the House, Representative Quie expressed particular regret that the two-year statute of limitations ran from the date of the charge rather than the commencement of the lawsuit.

> The part I feel especially is bad is the feature on the statute of limitations in this bill, which is not 2 years prior to enactment of this bill, but rather 2 years prior to the

[34] 118 CONG. REC. 4940 (1972) (remarks of Sen. Williams); see 118 CONG. REC. 4941 (1972) ("In any area where the new law does not address itself, . . . it is assumed that the present case law as developed by the courts shall continue to determine the applicability of Title VII.")

[35] S. CONF. REP. NO. 92-681 at 19 (1972); H.R. CONF. REP. NO. 92-899 at 19 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2179, 2183.

[36] 118 CONG. REC. 4942 (1972) (remarks of Sen. Williams).

charge being brought by anyone. Some of those may have been pending for 2 or 3 years already, so we are talking now of probably 5 years in which back pay can be requested.

I just do not think that was a wise decision. I think the House would have stood by the position of those of us who felt that this was unwise, and that the 2-year statute of limitations in this bill should have been 2 years prior to the enactment of the act. I think that would have been advisable.[37]

No member of the House disagreed with Quie's description of the bill or suggested that the limitation period would ordinarily be 180 or 300 days.

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[37] 118 CONG. REC. 7569-70 (1972) (remarks of Rep. Quie).

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In The

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE IMPACT FUND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, PUBLIC ADVOCATES, INC., THE WESTERN CENTER ON DISABILITY RIGHTS, PROTECTION AND ADVOCACY, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, EQUAL RIGHTS ADVOCATES, THE ASIAN PACIFIC AMERICAN LEGAL CENTER, THE LEGAL AID FOUNDATION OF LOS ANGELES AND THE MICHIGAN CIVIL RIGHTS DIVISION IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 6

I. INTRODUCTION..... 6

A. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD PARTICULARLY HARM VICTIMS OF SEXUAL HARASSMENT 8

B. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD INJURE THE RIGHTS OF EMPLOYEES WITH DISABILITIES, BY TRIGGERING THE STATUTE OF LIMITATIONS DURING THE REASONABLE ACCOMMODATION PROCESS..... 12

C. THE CONTINUING VIOLATION DOCTRINE SHOULD BE APPLIED WHERE AN EMPLOYEE IS THE VICTIM OF NUMEROUS SIMILAR DISCRIMINATORY ACTS AND A HOSTILE WORK ENVIRONMENT 16

D. THE CALIFORNIA SUPREME COURT'S RECENT DECISION IN *RICHARDS v. CH2M HILL* SHOULD GUIDE THIS COURT IN INTERPRETING THE CONTINUING VIOLATION DOCTRINE UNDER TITLE VII.... 19

E. ADOPTION OF THE NINTH CIRCUIT OR THE *RICHARDS* STANDARD FOR CONTINUING VIOLATION WILL NOT UNFAIRLY HARM EMPLOYERS..... 25

TABLE OF CONTENTS – Continued

Page

F. SINCE THIS COURT'S PREVIOUS INTERPRETATIONS OF SECTION 706(e) DID NOT INVOLVE THE CONTINUING VIOLATION DOCTRINE, THEY ARE DISTINGUISHABLE AND IRRELEVANT TO THIS CASE..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Accardi v. Superior Court, 17 Cal.App.4th 341 (1993) 18

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 23

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 23

Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999) 11

Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999) 30

Andrew v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) 17

Baskerville v. Culligan Internat'l Co., 50 F.3d 428 (7th Cir. 1995)..... 11

Bazemore v. Friday, 478 U.S. 385 (1986) 30

Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996)..... 12

Bodiford v. State of Alabama, 854 F.Supp. 886 (M.D. Ala. 1994) 13

Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994)..... 30

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996)..... 14

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 4, 10, 22, 26

Cardenas v. Massey, 2001 U.S. App. LEXIS 22372 (3d Cir. October 16, 2001) 30

Chardon v. Fernandez, 454 U.S. 6 (1981)..... 29

TABLE OF AUTHORITIES – Continued

Page

Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969) 7

Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998)..... 13

Delaware State College v. Ricks, 449 U.S. 250 (1980) 29

Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) 8, 11

EEOC v. Shell Oil Co., 466 U.S. 54 (1984)..... 23

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)..... 30

Faragher v. City of Boca Raton, 524 U.S. 775 (1998)..... 4, 10, 22, 26

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)..... 23

Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1999)..... 4

Goodman v. Boeing Co., 75 Wash.App. 60, 877 P.2d 703 (1994), *aff'd on other grounds*, 127 Wash.2d 703, 899 P.2d 1265 (1995) 14

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ..11, 17

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 28

Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996)..... 24

King v. Georgia Power Co., 295 F.Supp. 943 (N.D. Ga. 1968)..... 7

Lewis v. Board of Trustees, 874 F.Supp. 1299 (M.D. Ala. 1995)..... 13

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989)..... 29

TABLE OF AUTHORITIES – Continued

Page

Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993)..... 11

Martini v. Boeing Co., 88 Wash.App. 442, 945 P.2d 248 (1997), *aff'd on other grounds*, 137 Wash.2d 357, 971 P.2d 45 (1999) 14

McAlindin v. City of San Diego, 192 F.3d 1226 (9th Cir. 1999) 13

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 23

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 17

Moreman v. Georgia Power Co., 310 F. Supp. 327 (N.D. Ga. 1969)..... 7

Morgan v. National Railroad Passenger Corp., 232 F.3d 1008 (9th Cir. 2000).....16, 17, 28

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 17, 18

O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001)..... 11

Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998) 13

Richards v. CH2M Hill, Inc., 26 Cal.4th 798 (2001) .. *passim*

Sciaraffa v. Oxford Paper Co., 310 F.Supp. 891 (D. Me. 1970) 7

Sosa v. Hiraoka, 920 F.2d 1451 (9th Cir. 1990) 7

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 29

TABLE OF AUTHORITIES – Continued

Page

Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989) 17

Weeks v. Baker & McKenzie, 63 Cal.App.4th 1128 (1998) 26

West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995) 6, 7, 8

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) 7

RULES AND STATUTES

42 U.S.C.

§ 3601 28

§ 3612(a) 28

§ 1981a(b)(3) 26

§ 2000e-2 6

§ 2000e-5(e)(1) 6, 18, 20

§ 2000e-5(e)(2) 30

§ 2000e-5(g)(1) 26

§ 12101 ..... 5, 12

§ 12117(a) 5, 12

California Government Code

§ 12900 ..... 5, 19

§ 12960 19

§ 12993(a) 24

TABLE OF AUTHORITIES – Continued

Page

29 C.F.R.

§ 516.5 27

§ 1601.34 24

§ 1630.2(o)(3) 12

Appendix to Part 1630 – Interpretative Guidance on Title I of the Americans with Disabilities Act 12

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 24

EEOC: Technical Assistance on Title I of ADA, BNA FEP 405:6981 12

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BRIEF OF *AMICI CURIAE*

The non-profit civil rights organizations and public agency listed below respectfully submit this brief as *amici curiae*.[1] The brief supports the position of respondent Abner Morgan, Jr. and urges the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit. The parties have filed a stipulation with the Court, consenting to the filing of all briefs of *amici curiae*.

INTEREST OF THE *AMICI CURIAE*

The Impact Fund is a non-profit legal foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund focuses its resources on cases which raise issues of civil and human rights, poverty and environmental justice. The Impact Fund is currently litigating several race and gender discrimination class actions under Title VII.

Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

Public Advocates, Inc. is a non-profit, public interest law firm, one of the oldest public interest law firms in the nation. Throughout its history, the firm's mission has

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[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases.

The Western Law Center for Disability Rights (WLCDR) is a non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. Since 1975, the WLCDR has handled disability rights cases, including numerous employment, housing, and access cases under California and federal civil rights laws. The WLCDR provides assistance to persons with disabilities through litigation, mediation, education, and referrals to other agencies.

Protection and Advocacy, Inc. (PAI) is a non-profit organization that provides legal and other advocacy assistance to Californians with disabilities, including physical, learning, sensory, mental health and developmental disabilities. Since 1978, PAI has handled disability rights cases, including employment cases under federal and state law. Last year, PAI provided assistance to 245 individuals with disabilities regarding employment-related matters.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under Title VII since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF Employment program.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and has provided significant benefits to large groups of women.

The Asian Pacific American Legal Center of Southern California (APALC) is the largest provider of direct legal services, civil rights advocacy, community education and impact litigation for low-income Asian Pacific Americans in the country. Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including anti-discrimination, workers' rights, family law, immigration and hate crimes.

The Legal Aid Foundation of Los Angeles (LAFLA) has been providing civil legal services to low-income people in metropolitan Los Angeles for over 70 years. Through litigation and other representation, LAFLA helps working poor and low-wage workers address problems with pay, including minimum wage, overtime, and other pay-related problems, retaliation and discrimination in the workplace, and problems faced by former welfare recipients who are now working.

The Michigan Department of Civil Rights (MDCR) is a principal department of Michigan state government and is charged with enforcing the state's anti-discrimination laws. The state anti-discrimination laws which MDCR enforces prohibit, *inter alia*, discrimination in employment based upon religion, race, color, national origin, age, sex, height, weight, marital status or disability.

SUMMARY OF ARGUMENT

Although the continuing violation doctrine has been applied under Title VII since the early days of the statute, defendant and petitioner National Railroad Passenger Corporation ["Amtrak"] has argued that the doctrine should be recognized only in hostile environment harassment cases – and even then, should be unavailable if, before the start of the limitations period, the plaintiff knew or should have known that she (or he) was the victim of discrimination. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1999).

Use of a "knew or should have known" standard in applying the continuing violation doctrine would have serious consequences in hostile environment sexual harassment cases. Sociological and psychological research has proven that the *least frequent* response by victims of sexual harassment is filing a formal complaint or a lawsuit. Because of fear of retaliation, humiliation and career detriment, women employees generally pursue informal, non-confrontational methods to try to stop sexual harassment, consistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under Amtrak's proposed standard, female employees who used any informal complaint processes would probably be held to have demonstrated that they "knew or should have known" that they were victims of discrimination. Consequently, the continuing violation doctrine would cease to apply in hostile environment cases, where even Amtrak concedes it is appropriate.

A "knew or should have known" standard of continuing violation would severely harm the rights of employees with disabilities. The Court's interpretation of the continuing violation doctrine under Title VII applies

equally to the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA), because Title I of the ADA incorporates Title VII's procedures, including its statute of limitations. 42 U.S.C. § 12117(a). Employees with disabilities must identify their disability and engage in ongoing interactive dialogue with their employer to find reasonable accommodations for their disabilities. By doing so, however, they will arguably be demonstrating that they "knew or should have known" that they were being discriminated against, thus triggering the statute of limitations and making the continuing violation doctrine unavailable.

Amtrak's further argument that the continuing violation doctrine cannot apply to a "discrete discriminatory act" is irrelevant here. In five years at Amtrak, Abner Morgan, Jr. was disciplined or counseled *ten* times, was denied training and other career opportunities *five* times, and experienced *three* acts of retaliation – all in the context of a racially hostile environment which demeaned and insulted African-American employees. The same five managers perpetrated all these incidents and created the racially hostile environment. The Ninth Circuit properly held the particular incidents must be viewed as part of the same continuing violation.

In addition to the Ninth Circuit's analysis, this Court should take guidance from the California Supreme Court's careful and thorough review of the continuing violation doctrine in *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001). Although *Richards* interpreted the California Fair Employment and Housing Act (FEHA), Cal. Government Code, §§ 12900 *et seq.*, its analysis is persuasive in interpreting Title VII because the objectives and relevant wording of the two statutes is so similar.

Richards rejected the "knew or should have known" test urged by Amtrak.

Adoption of the Ninth Circuit or the *Richards* test for continuing violation will not unfairly harm employers. There is no empirical evidence that workers purposely delay in filing EEOC charges to win some alleged financial or strategic advantage. In fact, delay does not benefit employees financially. Title VII restricts compensation through its two-year limit on backpay and its stringent caps on compensatory and punitive damages.

Finally, this court's previous interpretations of section 706(e) are irrelevant here because the earlier decisions did not involve the continuing violation doctrine. They all concerned a single, time-barred act, not as in this case, a lengthy series of related acts, many of which were within the limitations period.

ARGUMENT

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 bars employment discrimination on the basis of race, *inter alia*. 42 U.S.C. §§ 2000e-2 *et seq*. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), requires employees claiming unlawful discrimination to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." If the employee first files with a state or local agency, the time to file with the EEOC is 300 days. *Ibid.*

From early in the history of Title VII, courts have recognized the "continuing violation doctrine" as an equitable exception to the statute of limitations in section 706(e). *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754 (3d

Cir. 1995).[2] As its name suggests, the continuing violation doctrine may be applied when discriminatory conduct continues over a considerable period of time, some of which is before the start of the limitations period. Where applicable, the doctrine permits the aggrieved employee to introduce evidence of, and recover damages for, both the pre- and post-limitations period discrimination so long as the employee files an EEOC charge within 180 (or 300) days after the last occurrence of discrimination. *West v. Philadelphia Elec. Co., supra*, 45 F.3d at 755.

A plaintiff can establish a continuing violation by showing a series of related acts, one or more of which are within the limitations period – a serial violation. *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990). Alternatively, the plaintiff can show a systematic policy or practice of discrimination that operated, in part, within the limitations period – a systemic violation. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982). The present case involves a serial violation.

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[2] The continuing violation doctrine was applied in numerous early Title VII decisions. *See, e.g., Cox v. U.S. Gypsum Co.*, 409 F.2d 289, 290 (7th Cir. 1969) [layoff and refusal to recall constitute continuing violations]; *Sciaraffa v. Oxford Paper Co.*, 310 F.Supp. 891, 896-897 (D. Me. 1970) [same]; *Moreman v. Georgia Power Co.*, 310 F.Supp. 327, 328 (N.D. Ga. 1969) [use of discriminatory tests is continuing violation]; *King v. Georgia Power Co.*, 295 F.Supp. 943, 946 (N.D. Ga. 1968) [maintenance of racially segregated facilities and promotional opportunities constitute continuing violations].

A. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD PARTICULARLY HARM VICTIMS OF SEXUAL HARASSMENT.

The rule proposed by Amtrak would wreak havoc in hostile environment sexual harassment cases, which involve ongoing patterns of abuse that are especially well-suited to the continuing violation doctrine. *See West v. Philadelphia Elec. Co., supra,* 45 F.3d at 755 ["natural affinity" between hostile work environment and continuing violation claims]; *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1108 (9th Cir. 1998) [same]. Sociological and psychological research has demonstrated that the *least frequent recourse* by victims of sexual harassment is filing a formal complaint or a lawsuit. Since Amtrak's proposed standard would *require* an employee to file an EEOC charge as soon as she knew or should have known that she was being harassed – or be barred from recovering for all conduct before the limitations period – employers would escape liability for most sexual harassment.

Two major academic articles extensively analyze women's responses to sexual harassment. *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* 51 Journal of Social Issues 117 (1995) by Fitzgerald, Swan and Fischer, and *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution,* 42 Journal of Vocational Behavior 102 (1993) by Lach and Gwartney-Gibbs. *See also* Note, *Notice in Hostile Environment Discrimination Law,* 112 Harv.L.Rev. 1977 (1999). The Fitzgerald and Lach articles, in turn, review over 100 other sexual harassment studies.

The Fitzgerald article concludes, "By far the *most infrequent response* is to seek institutional/organizational relief (i.e., notifying a supervisor, bringing a formal complaint, and filing a lawsuit). Victims apparently turn to such strategies as a last resort when all other efforts have failed." Fitzgerald, et al., *supra,* at 121 [italics added]. The most common responses, according to Fitzgerald, are the least confrontational ones: "victims are more likely to talk with a supervisor than to file a formal complaint, and legal claims are by far the least common response – truly the 'court of last resort.' " *Ibid.* Even among women who labeled their experience as harassment – and thus presumably met Amtrak's "knew or should have known" standard – one national study found that 74 percent responded by telling the harasser to stop while only 12 percent filed a complaint of any kind. *Id.* at 122.

The Lach article similarly reports that women prefer to resolve harassment disputes through informal means, such as stalling or ignoring the harasser; confronting the harasser either politely or more directly; or reporting the harasser to a higher authority. Only a very small number used "formal complaint channels," presumably internal complaint procedures. Lach, et al., *supra,* at 110.

The most common reason for not formally reporting harassment is fear, according to both articles – fear of retaliation, of not being believed, of hurting one's career, or of being humiliated. Sadly, retaliation is common and the most assertive employees suffer the greatest costs. One study of female state employees reported that 62 percent of those who complained of sexual harassment experienced retaliation, including lowered job evaluations, denial of promotions, and being transferred or fired. In a survey of sexual harassment of federal workers

conducted by the U.S. Merit Systems Protection Board, one-third of employees who filed formal claims said it only "made things worse." According to a study of sexual harassment in the Navy, one-third of harassment victims reported they were humiliated in front of others when they complained. Another survey concluded that women who responded assertively to harassment had more negative outcomes in terms of their jobs, their emotional well-being and their health. Fitzgerald, et al., *supra*, at 122-123. Lach, et al., *supra*, at 110-111.

Retaliation by potential future employers is also a serious problem. In a 1992 survey of 1100 California companies, 75-80 percent of the responding employers admitted they would not give equal consideration to job applicants who had sued their former employers for wrongful termination, sexual harassment, unequal pay or failure to promote, even if the suits were valid and justifiable. Applicants who were in the midst of litigation fared even worse; 87 percent of the respondents would not consider the person equally with other candidates. Spoon & Ellis, *The Litigation Stigma: Lawsuits Come Back to Haunt*, 70 HR Focus No. 2, p. 19 (Feb. 1993).

Thus, Amtrak's proposed "knew or should have known" standard would have a devastating effect on sexual harassment victims. It would deny relief for events which were part of an ongoing pattern of discriminatory treatment but were not the subject of an immediate EEOC charge. An employee who tried to work out problems informally with her employer – as most women do and as this Court *required* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) – would face the very real danger that a court would decide she had waited too long and had

forfeited her right to relief for the earlier incidents because she knew or should have known the initial conduct was discriminatory. And because creation of a hostile work environment depends on the accumulation of many incidents, excluding the earlier incidents would make it far more difficult for the plaintiff to establish liability for the later events that were within the limitations period.[3]

Moreover, if the employee did file a discrimination charge and pursue litigation at the time of the first discriminatory act, that conduct, standing alone, might not survive summary judgment if the challenged actions were not sufficiently "severe or pervasive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993); *Baskerville v. Culligan Internat'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). The bottom line is that, under Amtrak's proposed standard, hostile environment sexual harassment victims run the real risk of being both too early and too late.[4]

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[3] *See Anderson v. Reno*, 190 F.3d 930, 934 (9th Cir. 1999) [district court found no hostile environment after excluding earlier incidents; appellate court reversed, finding continuing violation]; *Draper v. Coeur Rochester, Inc., supra*, 147 F.3d 1104 [same]; *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1418 (10th Cir. 1993) [same].

[4] Federal courts have sometimes recognized that using the "knew or should have known" standard produces such draconian results that they have not strictly applied the test. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001) [continuing violation doctrine applied because female firefighter, who endured nearly four years of intense sexual harassment before filing EEOC charge, might not have realized there was actionable discrimination].

B. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD INJURE THE RIGHTS OF EMPLOYEES WITH DISABILITIES, BY TRIGGERING THE STATUTE OF LIMITATIONS DURING THE REASONABLE ACCOMMODATION PROCESS.

Adoption of the "knew or should have known" standard of continuing violation would injure the rights of employees with disabilities. Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA), incorporates the enforcement procedures of Title VII, including its statute of limitations. 42 U.S.C. § 12117(a). Consequently, this Court's interpretation of the continuing violation doctrine under Title VII will apply to the ADA.

The ADA requires that employees with disabilities identify their disabilities in order to obtain reasonable accommodation on the job. *Beck v. University of Wisconsin Bd. of Regents,* 75 F.3d 1130, 1134-1135 (7th Cir. 1996). Reasonable accommodation is a modification to a job or the work environment that enables a qualified individual with a disability to attain the same level of performance or enjoy equal benefits of employment as are available to a similarly-situated person without a disability. EEOC: Technical Assistance on Title I of ADA, BNA FEP 405:6981, 6999. Thereafter, the employee and employer must engage in an ongoing interactive dialogue, identifying accommodations that will enable the worker to perform the essential functions of the job. *Beck, ibid.; see* 29 C.F.R. § 1630.2(o)(3) ["informal, interactive process" involving both employer and employee]; 29 C.F.R. Appendix to Part 1630 – Interpretative Guidance on Title I of the Americans with Disabilities Act ["flexible, interactive process"].

The obligation to accommodate an employee's disability is a "continuing duty that is not exhausted by one effort." *McAlindin v. City of San Diego,* 192 F.3d 1226, 1237 (9th Cir. 1999) [internal quotations omitted], quoting *Ralph v. Lucent Technologies, Inc.,* 135 F.3d 166, 172 (1st Cir. 1998) and *Criado v. IBM Corp.,* 145 F.3d 437, 445 (1st Cir. 1998). Moreover, for some disabilities, the employee's condition may change over time, requiring a revisting of appropriate accommodation. Additional discussions may also be required to fine-tune a particular accommodation to meet the needs of both employee and employer. For these reasons, negotiations about accommodations may last beyond the 180- or 300-day limitations period.

The California Supreme Court recently analyzed the continuing violation doctrine in the context of claims of failure to accommodate and disability harassment in *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th 798. The court noted there was "particularly good reason to view the failure over time to reasonably accommodate a disabled employee as a single course of conduct." 26 Cal.4th at 821. Reasonable accommodation "is often an ongoing process rather than a single action" and "this process may have many facets and take a number of different forms." *Id.* at 821-822. As with harassment, an instance of an employer's failure to accommodate that in isolation may seem trivial "can assume greater significance and constitute a greater injury when viewed as one of a series of failures." *Id.* at 822.[5]

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[5] For this reason, both federal and state courts, applying the ADA or state discrimination statutes, have found a continuing violation for the entire course of an employer's discrimination against employees with disabilities. *See Lewis v. Board of Trustees,* 874 F.Supp. 1299, 1304 (M.D. Ala. 1995); *Bodiford v. State of Alabama,* 854 F.Supp. 886, 891 (M.D. Ala.

As applied to the ADA, the "knew or should have known" standard would require employees with disabilities to file an EEOC charge *each time* the employer failed to provide a particular accommodation within 180 (or 300) days of the time it was first requested. If the employee did not, the employer could claim that, by requesting accommodations, the employee demonstrated awareness of his legal rights and should be barred from asserting that he was entitled to that accommodation. The ADA's requirement of individualized assessment and interactive discussions of possible accommodations would be undermined by a steady stream of discrimination charges, EEOC investigations, and the threat of imminent court litigation. Instead of promoting the necessary communication and cooperation between employees with disabilities and their employers (*Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996)), Amtrak's rule would produce confrontation and controversy.

The "knew or should have known" standard also disregards the enormous external barriers to employment that people with disabilities face. Notably, one of the key Congressional motivations behind the ADA was the staggering level of unemployment for persons with disabilities.[6] While the prospects for employment of people with

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1994); *Martini v. Boeing Co.*, 88 Wash.App. 442, 945 P.2d 248, 254 (1997), *aff'd on other grounds*, 137 Wash.2d 357, 971 P.2d 45 (1999); *Goodman v. Boeing Co.*, 75 Wash.App. 60, 877 P.2d 703, 712-714 (1994), *aff'd on other grounds*, 127 Wash.2d 703, 899 P.2d 1265 (1995).

[6] *See, e.g.*, Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 9 (1989) ("Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Lou Harris poll not working

disabilities have improved since the passage of the ADA, discrimination and unemployment remain severe problems. These statistics are documented in the N.O.D./ Harris 2000 Survey of Americans with Disabilities ("N.O.D. Survey"), excerpts of which may be found on the website for the National Organization on Disability, www.nod.org. As the report notes, "there has been a significant increase in the percentage of people with disabilities who are able to work and are working from 46% in 1986 to 56% today." But nevertheless, according to the N.O.D. Survey, a decade after the ADA's enactment, "more than 3 out of 10 employed people with disabilities (36%) say they have encountered some form of discrimination in the workplace due to their disabilities, the most prevalent of which is not being offered a job for which they are qualified. More than half (51%) of those who have experienced discrimination say they have been refused a job due to their disabilities."

Given the continued prevalence of discrimination in the American workplace, which dramatically affects the re-employment prospects for people with disabilities, employees with disabilities may delay filing a formal charge of employment discrimination out of fear that it would alienate their employer or even risk their job and health insurance benefits. In short, imposing a "knew or should have known" test in construing the continuing

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is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.")

violation doctrine under Title VII would seriously compromise the federally guaranteed civil rights of employees with disabilities.

C. THE CONTINUING VIOLATION DOCTRINE SHOULD BE APPLIED WHERE AN EMPLOYEE IS THE VICTIM OF NUMEROUS SIMILAR DISCRIMINATORY ACTS AND A HOSTILE WORK ENVIRONMENT.

Amtrak's argument that the continuing violation doctrine cannot apply to a "discrete discriminatory act" has no relevance here. Abner Morgan was the victim of *ten* disciplinary and counseling incidents, *five* instances of denial of career opportunities (including denial of training, being barred from an apprenticeship program and being hired as an electrician helper instead of as an electrician) and at least *three* incidents of retaliation. *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1016-17 (9th Cir. 2000). These 18 episodes occurred in the context of a racially hostile environment in which African-American employees were being demeaned, insulted, called "nigger" and "boy" and told to "get [their] black ass" into the office. Significantly, the 18 incidents and the "racially-laden environment" were perpetrated by the same five managers. *Id.*

In its decision, the Ninth Circuit recognized that the numerous incidents were part of a continuing pattern: "These incidents reveal a consistent pattern of similar employment actions (e.g., discipline and denial of professional training) over the entire five-year period of employment, perpetrated by the same core group of managers. *Such incidents are not discrete or isolated.*" 232 F.3d at 1016 [italics added]. The court carefully analyzed the

evidence to determine whether the same kinds of discriminatory conduct occurred both before and within the limitations period. The court also noted that the evidence of each alleged violation "significantly overlaps," so that "segregating them is both a difficult and artificial task." *Ibid.* at n. 16. Viewing the pre-limitations acts in the "context of the totality of Morgan's relationship with Amtrak," the court concluded that the earlier incidents were "part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure." *Id.* at 1017.[7]

Such analysis falls squarely within this Court's oft-repeated warnings that the existence of discrimination must be determined in light of "the record as a whole," "the totality of circumstances," and "all the circumstances." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998); *Harris v. Forklift Systems, Inc., supra*, 510 U.S. at 23; *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986). *Accord: Andrew v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) [discrimination analysis must concentrate on the overall scenario, not on individual incidents]; *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) [factfinder should not examine each alleged incident of harassment in a vacuum]. A trier of fact might reasonably find that the combined evidence of disciplinary incidents, denials of career opportunities, acts of retaliation, and racially hostile environment

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[7] The fact that the same five managers were responsible for all the discriminatory acts was not necessary for application of the continuing violation doctrine but certainly undercuts Amtrak's argument that these were "discrete" or "isolated" incidents. *Morgan, supra*, 232 F.3d at 1014-1017.

proved that Amtrak managers were "motivated by general hostility to the presence of [African-Americans] in the workplace." *Oncale, supra,* 523 U.S. at 80.

The Ninth Circuit's reasoning is consistent with Section 706(e)'s key phrase, "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). As noted in *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th at 818, and discussed *infra,* the dictionary definition of "practice" includes "repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage." By this definition, the ten incidents of discipline certainly constitute a "practice," as do the five episodes of denial of career opportunities and the three incidents of retaliation. These events were not isolated or discrete acts.

A California court of appeal confronted a similar issue in a sex discrimination case under the California FEHA, *Accardi v. Superior Court,* 17 Cal.App.4th 341 (1993). In *Accardi,* a female police officer was subjected to years of sexual harassment and discrimination. When she later suffered a knee injury, her employer denied her light duty assignments that male officers received and also prepared false medical reports about her. Although only the post-injury incidents were within the FEHA one-year limitations period, the court held the continuing violation doctrine allowed the plaintiff to introduce evidence of the long history of sexual harassment and discrimination. The gist of the plaintiff's complaint, the court stated, was that the police department waged "a decade-long campaign against her," based on an unwritten policy that law enforcement is a "man's job." 17 Cal.App.4th at 350. The denial of light duty and false medical reports may have been undertaken with the same discriminatory purpose – "ridding the police department of female officers." *Id.* at

351. "If credited, these acts constitute a continuous manifestation of a sex-based animus that would bring the prior acts within the statute of limitations." *Ibid.*

Consequently, this case presents no opportunity for this Court to decide whether the continuing violation doctrine can apply to what Amtrak calls a "discrete discriminatory act." Rather, consistent with the Court's emphasis on the "totality of circumstances," the Court should hold that when agents of an employer commit numerous similar discriminatory acts while creating a hostile work environment, the particular incidents should be considered part of the same continuing violation.

D. THE CALIFORNIA SUPREME COURT'S RECENT DECISION IN *RICHARDS v. CH2M HILL* SHOULD GUIDE THIS COURT IN INTERPRETING THE CONTINUING VIOLATION DOCTRINE UNDER TITLE VII.

In *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th 798, the California Supreme Court recently issued a definitive discussion of the continuing violations doctrine which should serve as guidance to this Court, along with the Ninth Circuit's analysis. Although *Richards* interpreted the California Fair Employment and Housing Act (FEHA), Cal. Gov. Code, §§ 12900 *et seq.*, its reasoning is persuasive in interpreting Title VII because "the anti-discrimination objectives and relevant wording of title VII . . . are similar to those of the FEHA." *Richards, supra,* 26 Cal.4th at 812. Indeed, the language of the FEHA and Title VII statutes of limitations is strikingly similar. The FEHA bars the filing of an administrative complaint more than one year "from the date upon which the alleged unlawful practice . . . occurred." Cal. Gov. Code, § 12960. Title VII provides that a charge shall be filed within 180

(or 300) days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

Plaintiff Lachi Richards had worked as an engineer for CH2M Hill for four years when in 1988 she was diagnosed with multiple sclerosis and started to use a wheelchair. Immediately thereafter, she began to experience various types of harassment at work. Over the next five years, until her resignation in early 1993, Richards repeatedly asked her employer for accommodations for her disability, including the removal of physical barriers throughout the office. After much delay, the company made some changes but never provided many other requested accommodations.

Richards resigned and filed an administrative complaint with the California Department of Fair Housing (DFEH) and later filed a civil action under the FEHA for disability harassment and discrimination. CH2M Hill moved to exclude evidence of conduct before January 25, 1993, one year before the filing of Richards' administrative complaint. The trial court denied the motion, and at trial Richards was permitted to introduce evidence of, and seek damages for, the entire five-year period, 1988-1993. The jury found CH2M Hill had created a hostile work environment and failed to reasonably accommodate Richards' disability and awarded sizable damages.

The California Court of Appeal reversed, holding the trial court had misapplied the continuing violation doctrine and had improperly allowed the jury to award damages for injuries occurring outside the one-year limitations period. Citing many of the federal cases relied on by Amtrak herein, the court held the statute of limitations was tolled only up to the point Richards "knew or should have known" that her rights were being violated. Under

that test, all employer conduct occurring before the limitations period was time-barred.

The California Supreme Court reversed, rejecting the "knew or should have known" standard. After reviewing numerous approaches to the continuing violation doctrine under federal case law, the high court held that an employer's series of unlawful actions should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired such a degree of permanence that the employee is on notice that further efforts at informal conciliation with the employer to end discrimination or harassment would be futile. 26 Cal.4th at 802, 823. The statute of limitations will begin to run when *either* (1) the discriminatory "course of conduct" is brought to an end by the employee's termination, resignation, or constructive discharge or by the employer's cessation of such conduct, *or* (2) the employer makes clear to the employee "in a definitive manner" that further efforts at informal conciliation will be futile. *Id.* at 823.[8]

Richards reasoned that employees should be encouraged to pursue informal conciliation with their employer rather than immediately initiating litigation by filing an administrative complaint with the DFEH. "[I]t is contrary to the purposes of the FEHA to interpret its statute of limitations to encourage premature litigation at the

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[8] This conduct by the employer must be more than simply a statement denying liability for a particular act in the course of conduct or a statement that insufficient evidence exists to corroborate a particular occurrence or to take corrective action. Instead, the employer must make clear that the employee should no longer file complaints or expect any further investigation or informal conciliation efforts.

expense of informal conciliation." *Id.* at 820. Requiring an employee to file with the administrative agency while he or she is still employed "would reduce sharply any chance of conciliation between employer and employee and draw the Department into investigations that might have been avoided through informal conciliation." *Ibid.* In most cases, an employee would feel compelled to resign "to avoid the awkwardness of maintaining employment while pursuing litigation against his or her employer." *Ibid.* An employer that creates or tolerates a persistent pattern of harassment or other discrimination cannot complain of the employee's delay in filing when the employee retains employment in hopes informal conciliation will succeed. *Id.* at 822.

In short, said the *Richards* court, the statute of limitations should not be interpreted to give a victim of discrimination two unappealing choices: (1) resigning and bringing legal action soon after the first signs that his or her rights have been violated, or (2) attempting to persist in the informal conciliation process and risk forfeiting the right to bring such an action altogether. *Id.* at 821.

Richards' emphasis on conciliation over litigation and on using informal procedures to resolve worksite problems echoes this Court's approach in recent Title VII cases. In *Burlington Industries, Inc. v. Ellerth, supra,* 524 U.S. 742, the Court stressed "Congress' intention to promote conciliation rather than litigation in the Title VII context" and praised the EEOC's policy of encouraging companies to adopt internal complaint procedures so employees can report harassing conduct before it becomes severe or pervasive. *Id.* at 764. *Accord: Faragher v. City of Boca Raton, supra,* 524 U.S. at 806 [Title VII's "primary objective" is "not to provide redress but to avoid harm."]. Accordingly, in *Ellerth* and *Faragher,* the

Court held that in hostile environment sexual harassment cases involving no tangible employment action against the employee, an employer could claim an affirmative defense to liability only if it had established internal complaint procedures to correct harassing behavior and the harassed employee had unreasonably failed to use those procedures.

Similarly, in *Ford Motor Co. v. EEOC,* 458 U.S. 219, 228 (1982), the Court declared the "primary objective" of Title VII is to "bring employment discrimination to an end," and the "preferred means for achieving this goal is through '[c]ooperation and voluntary compliance.' " [Quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974)] The victims of job discrimination "want jobs, not lawsuits," the Court stated. *Ford Motor Co., supra,* 458 U.S. at 230. Accordingly, the Court adopted a legal rule designed to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants. *See also EEOC v. Shell Oil Co.,* 466 U.S. 54, 77 (1984) [Congress hoped to encourage employers to comply voluntarily with Title VII]; *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 358 (1995) [Congress intended remedial measures in Title VII and ADEA to serve as "spur or catalyst" to cause employers to "self-examine and to self-evaluate their employment practices."]

Richards' interpretation of the term "unlawful practice" in the FEHA is directly applicable to Title VII, which uses the nearly identical term "unlawful employment practice." As the California court noted (26 Cal.4th at 818), both lay and legal dictionaries define the term "practice" to mean a course of conduct. For example, Webster's defines "practice" as "to do or perform often,

customarily, or habitually; to make a practice of." Webster's New International Dictionary, p. 1937, col. 3 (2d ed. 1958). Similarly, Black's Law Dictionary defines "practice" as "[r]epeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage." Black's Law Dictionary, p. 1172, col. 1 (6th ed. 1990). Thus, in the context of a continuing violation, "unlawful practice" refers to the entire discriminatory course of conduct. Precisely the same is true of Title VII's analogous term, "unlawful employment practice." Viewing a pattern of related discriminatory acts as a single actionable wrong is consistent with this language. So long as the employee files his charge within the limitations period following the last illegal act, the charge is timely.

Richards was also influenced by the California statute's mandate that its provisions "shall be construed liberally for the accomplishment of the purposes thereof." Cal. Gov. Code, § 12993(a). To carry out the FEHA's purpose of safeguarding the right of employees to hold employment without discrimination, this liberal construction must extend to interpretations of the FEHA's statute of limitations, the Supreme Court held. *Richards, supra,* 26 Cal.4th at 819. But Title VII also requires a liberal interpretation. *Haynes v. Williams,* 88 F.3d 898, 901 (10th Cir. 1996). It is equally fitting that such an interpretation apply to Title VII's statute of limitations. *See* 29 C.F.R. § 1601.34 ["rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII."].

Congress clearly so intended in 1972, when it amended Title VII to extend the EEOC charge-filing period from 90 to 180 days. In the Final Conference Committee Report, Congress proclaimed that it intended to adopt prior court decisions which "have shown an

inclination to interpret this time limitation so as to give the aggrieved person the *maximum benefit of the law. . . .*" Section-by-Section Analysis of H.R. 1746, 118 Cong. Rec. 7167 (Senate), 118 Cong. Rec. 7565 (House) [italics added]. The Conference Report specifically stated that Congress intended to "continue" "existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence. . . ." *Ibid.* The report also provided that "other interpretations of the courts maximizing the coverage of the law are not affected." *Ibid. See* footnote 2, *supra,* for early continuing violations decisions.

In short, the California Supreme Court's thoughtful interpretation of continuing violation in *Richards v. CH2M Hill* is consistent with the language, purposes, and legislative history of Title VII. This court should apply *Richards'* reasoning in interpreting the continuing violations doctrine under Title VII.

E. ADOPTION OF THE NINTH CIRCUIT OR THE *RICHARDS* STANDARD FOR CONTINUING VIOLATION WILL NOT UNFAIRLY HARM EMPLOYERS.

Employers will not be unfairly disadvantaged if this Court adopts the continuing violation doctrine as applied by the Ninth Circuit or by the California Supreme Court in *Richards v. CH2M Hill, supra.*

Amtrak's argument that the continuing violation doctrine should not be available to employees who "knowingly" let the limitations period expire has no basis in fact. There is no empirical evidence that workers deliberately wait to file EEOC charges to secure some alleged

strategic or financial advantage. Rather, as demonstrated *supra*, employees delay in filing formal discrimination charges with the EEOC or a state agency because they do not know their rights, they do not recognize the employer's conduct as discriminatory, they are trying to work out problems informally with their employer, or they fear retaliation.

At any rate, employers have ample protection against employees who delay filing without justification. In hostile environment sexual harassment cases, where even Amtrak concedes the continuing violation doctrine can properly apply, an employee's unreasonable failure to use internal complaint procedures provides an affirmative defense against liability. *Burlington Industries, Inc. v. Ellerth, supra*, 524 U.S. 742; *Faragher v. City of Boca Raton, supra*, 524 U.S. 775. In ADA cases, employers are on notice because employees with disabilities must affirmatively request reasonable accommodation and thus employers can prepare against a possible EEOC charge.

Moreover, delay does not benefit employees financially because Title VII severely restricts back pay and damages. Back pay is limited to two years from the discrimination charge, regardless of when it is filed. 42 U.S.C. § 2000e-5(g)(1). Compensatory and punitive damages, originally unavailable, are permitted but severely limited since the 1991 amendments. For employers with more than 500 employees, compensatory and punitive damages together are capped at $300,000. For smaller employers, the cap ranges from $50,000 to $200,000. 42 U.S.C. § 1981a(b)(3).[9]

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[9] By comparison, no such limits apply under California's FEHA. In *Richards*, the plaintiff was awarded nearly $1 million in non-economic damages. In *Weeks v. Baker & McKenzie*, 63

Further, the traditional arguments in favor of strict enforcement of statutes of limitations – a defendant's interest in marshaling evidence while memories are fresh and witnesses are available, the value of finality and repose, and the avoidance of "staleness" – actually are consistent with, and indeed support, a broad continuing violation theory in the employment context.

Employers have a unique ability to marshal evidence and find witnesses to defend employee lawsuits complaining of a history of discrimination. Employers routinely document interactions with their employees. They keep personnel files in which they record information about all aspects of their employees' work lives. Many employers, particularly large companies like Amtrak, employ human resources specialists trained to analyze and record personnel information. Employers are required by law to preserve many employee records for years. *See, e.g.*, 29 C.F.R. § 516.5 [payroll records must be kept three years]. Employers can also locate current and past employees who can act as witnesses in any employment-related litigation.

The defendant's interest in finality and repose may justify a narrow reading of the applicable statute of limitations in a case involving a *single* wrongful act. By definition, however, a continuing violation case involves an *ongoing* pattern of discrimination and/or harassment. An employer who has engaged in such misconduct should not be allowed to rely on the policy favoring finality and repose. The harm which such an employer

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Cal.App.4th 1128 (1998), a sexual harassment case, the plaintiff won $50,000 in compensatory damages and over $3.5 million in punitive damages.

continues to inflict on its worker offsets any claim to those values.

Finally, staleness is not an issue in the context of continuing violation cases. This Court so held in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which involved the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, *et seq.* The Housing Act's statute of limitations, which tracks the language of section 706(e) of Title VII, requires a civil action to be commenced within 180 days "after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a). Finding that five incidents of racial steering (four of which were outside the limitations period) constituted a continuing violation, the court held the complaint was timely because it was filed within 180 days of the last occurrence. Although statutes of limitations are intended to keep stale claims out of court, the court observed, "Where the challenged violation is a continuing one, the staleness concern disappears." *Id.* at 380.

F. SINCE THIS COURT'S PREVIOUS INTERPRETATIONS OF SECTION 706(e) DID NOT INVOLVE THE CONTINUING VIOLATION DOCTRINE, THEY ARE DISTINGUISHABLE AND IRRELEVANT TO THIS CASE.

The continuing violation doctrine, as presented in this case, involves a "serial violation" – a series of related illegal acts, one or more of which is within the limitations period. *Morgan v. National Railroad Passenger Corp., supra,* 232 F.3d at 1015. This Court's prior decisions interpreting section 706(e) did not address a serial violation. In the previous cases, which are discussed below, there was only one illegal act, which was time-barred. Consequently, past decisions do not provide any guidance in interpreting the continuing violation doctrine here.

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court held that an academic employee who claimed his denial of tenure was discriminatory had to file an EEOC charge within 180 days of the tenure decision, not within 180 days of his discharge one year later. The only discriminatory act was the denial of tenure, the court observed. The termination was simply a delayed but inevitable consequence of the tenure denial. As a result, the continuing violation doctrine did not apply. *Accord: Chardon v. Fernandez*, 454 U.S. 6 (1981).

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), a female flight attendant was terminated in 1968, pursuant to a "no-marriage" rule applied only to women. She did not file an EEOC charge. In 1972, the plaintiff was rehired but the employer refused to credit her with lost seniority. At that point, the plaintiff filed a charge. As in *Ricks*, the court found there was no present violation of the statute. The only discriminatory act was the plaintiff's termination four years earlier. The seniority system, which was neutral in operation, merely gave present effect to a past act of discrimination. Consequently, the continuing violation doctrine did not apply.

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), involved a discriminatory seniority system which had been in place for three years without challenge. When female employees later experienced the effects of the discriminatory system by being demoted, they filed EEOC charges and sued. Relying on *Ricks* and *Evans*, the Court held the plaintiffs' charges were time-barred because the only illegal act was the discriminatory adoption of the seniority system, which had occurred outside the limitations period. Again, the continuing violation doctrine was inapplicable because the case involved only one discriminatory act. Congress legislatively overruled

Lorance in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-5(e)(2).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), did not address the continuing violation doctrine. *Robbins & Myers* held that the statutory period for filing an EEOC charge was not tolled during the pendency of grievance procedures under a collective bargaining agreement.

Finally, *Bazemore v. Friday*, 478 U.S. 385 (1986), held that a public entity which racially discriminated in salaries before it was covered by Title VII could not perpetuate the discrimination after Title VII applied to it. Section 706(e) was not involved. *Bazemore* has been interpreted to mean that the continuing violation doctrine applies in a disparate pay case and the charge-filing period runs from the last discriminatory paycheck. *See, e.g., Cardenas v. Massey*, 2001 U.S. App. LEXIS 22372 (3d Cir. October 16, 2001); *Anderson v. Zubieta*, 180 F.3d 329, 335-337 (D.C. Cir. 1999); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-351 (4th Cir. 1994).

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted,

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OCTOBER 2001

No. 00-1614

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief For The Lawyers' Committee For Civil Rights Under Law; The National Association For The Advancement Of Colored People; The Minority Business Enterprise Legal Defense And Education Fund, Inc.; Now Legal Defense And Education Fund; The National Women's Law Center; The National Partnership For Women And Families; The American Jewish Congress; AARP; And The National Employment Lawyers Association As Amici Curiae In Support Of Respondent

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QUESTION PRESENTED

Whether a pattern of discriminatory acts or practices outside of Title VII's charge-filing period is actionable and provides a basis for recovery as a continuing violation, where one or more related acts occur within the charge-filing period.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of Interests of *Amici Curiae*	1
Statement of the Case	4
Summary of Argument	4
Argument	7
I. A "Continuing Violation" Accrues At The Time Of The Last Asserted Act In The Pattern Of Discrimination.	7
A. The Continuing Violation Doctrine Postpones Accrual Until The Continuing Wrong Ceases.	7
B. There Is No Foundation In Either Title VII Or In This Court's Cases for the Arguments Advanced By Petitioner And The United States.	12
C. The EEOC's Own Rule, To Which This Court Owes "Great Deference," Is Identical to the Rule Applied By the Court of Appeals.	20

Contents

	Page
II. Title VII's Explicit Provisions Affording Relief Should Not Be Undercut By An Implied Limitation Based On The Charge-Filing Provision.	22
A. By Its Plain Terms, Section 706(g)(1) Provides For the Award of Monetary Relief Covering A Period Longer Than the Statutory Filing Period.	23
B. In Providing For Compensatory and Punitive Damages Under Title VII, Congress Chose a Detailed Schedule of Limitations Drastically Different From The Charge-Filing Period.	25
III. The Existing Continuing Violation Doctrine Comports With Legislative Intent, Fosters Judicial Economy, And Promotes Equity.	26
A. The Established Continuing Violation Doctrine Endorsed and Facilitated by Congress Serves the Purposes of Title VII.	26
B. Grafting A "Notice" Limitation Onto Section 706(e) Would Encourage Multiple, Premature Lawsuits.	29
Conclusion	30

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Page

Cases:

Abramson v. University of Hawaii, 594 F.2d 202 (1979) 7

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 24, 27, 28

Anisman v. O'Neill, 2001 WL 402493 (E.E.O.C. Apr. 12, 2001) 21

Auciello Iron Works, Inc. v. N.L.R.B., 517 U.S. 781 (1996) 20

Bazemore v. Friday, 478 U.S. 385 (1986) 9, 10, 11, 13, 17, 18, 23, 29

Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983) 14, 17

Cardenas v. Massey, No. 00-5225, 2001 WL 1230325 (Oct. 16, 2001) 11

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 19, 20

Delaware State College v. Ricks, 449 U.S. 250 (1980) 7, 8, 11, 13, 17, 23

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 27, 28, 29

Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2001) 12

Page

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 24

Galloway v. General Motors Service Parts Operations, 78 F.3d 1164 (7th Cir. 1996) 14, 15, 16

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Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..20, 27

Hammontree v. N.L.R.B., 925 F.2d 1486 (D.C. Cir. 1991) 20

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 19

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 8, 9, 10, 13, 17, 18, 23, 29

Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001) ... 16, 29

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) ... 19

Kolstad v. American Dental Ass'n, 119 U.S. 2118 (1999) 27

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 7, 8, 11, 13, 17, 18, 23

Lorillard v. Pons, 434 U.S. 575 (1978) 5

Louisiana v. United States, 380 U.S. 145 (1965) .. 28

Page

Melville Confections, Inc. v. N.L.R.B., 327 F.2d 689 (7th Cir. 1964) 20

Miller v. Beneficial Mgmt. Corp., 977 F.2d 834 (3d Cir. 1992) 11

Morgan v. National R.R. Pass. Corp., 232 F.3d 1008 (9th Cir. 2001) 4

Pollard v. E.I. Du Pont De Nemours & Co., 121 S. Ct. 1946 (2001) 24

Rotella v. Wood, 528 U.S. 549 (2000) 19

Sabree v. United Bhd. of Carpenters and Joiners, Local 33, 921 F.2d 396 (1st Cir. 1990) 15

Scrivner v. Socorro Indep. Sch Dist., 169 F.3d 969 (5th Cir. 1999) 28

Stuart v. General Motors Corp., 217 F.3d 621 (8th Cir. 2000) 28

Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983) .. 16

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 8, 10, 11, 13, 17, 23

Statutes:

42 U.S.C. § 1981 2

42 U.S.C. § 1981a 4, 5, 6, 20, 22

Page

42 U.S.C. § 1981a(b)(3) 26

42 U.S.C. § 1983 ..... 16, 29

42 U.S.C. § 2000e, *et seq.* 4

42 U.S.C. § 2000e-2(h) 24

42 U.S.C. § 2000e-5(e) ..... *passim*

42 U.S.C. § 2000e-5(e)(1) 7, 24

42 U.S.C. § 2000e-5(e)(2) 18

42 U.S.C. § 2000e-5(g)(1) 6, 18, 20, 22, 23, 24

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42 U.S.C. § 3612(a) 8

Other Authorities:

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118 Cong. Rec. at 4940, 4941 18

EEOC Compliance Manual § 2-IV.C.2 ..... 21, 23

STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared before courts throughout the nation in numerous civil rights cases concerning employees' rights to bring claims of employment discrimination.

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1. By letter to the Court dated July 26, 2001, the parties consented to the filing of *amicus curiae* briefs by any third party in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs that ensure the fair and equitable participation of minority businesses in the marketplace. As part of its mission, MBELDEF also pursues litigation on behalf of minority business enterprises to attack discriminatory barriers and practices in the marketplace where the issues are part and parcel to the attainment of economic parity and full integration of the marketplace. Many of the lawsuits brought by MBELDEF seek to address "continuing violations" in the making or enforcement of contracts under 42 U.S.C. § 1981. Accordingly, MBELDEF has a strong interest in ensuring that our ability to address such violations through legal recourse is not diminished.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, and has participated as an *amicus curiae* in many cases before this Court.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination form all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of

1964 as amended. NWLC has filed numerous *amicus curiae* briefs on employment law and civil rights issues.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in this Court and in the federal circuit courts of appeals to advance the opportunities of women and minorities in employment.

The American Jewish Congress is an organization of American Jews committed to the protection of the civil, economic, political and religious rights of American Jews and all Americans. It was founded in 1918 and since that time has continually urged full equality in employment.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of

lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters. NELA has filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws.

STATEMENT OF THE CASE

Amici curiae adopt the statement set out in Respondent's brief.

SUMMARY OF ARGUMENT

This case presents questions regarding the proper application of this Court's "continuing violation" doctrine in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII" or "the Act"), and the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. § 1981a). Specifically, the case involves whether discriminatory conduct outside the charge-filing period in § 706(e) of the Act, 42 U.S.C. § 2000e-5(e), can be the subject of suit and recovery, where such conduct is "part of a series or pattern of discrimination, retaliation, and hostile environment that started" prior to the charge-filing period, and where one or more related acts of discrimination occurred within the filing period. *Morgan v. National R.R. Pass. Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2001).

Amici, in support of Respondent, urge the Court to reaffirm the established "continuing violation" doctrine by which Title VII liability reaches patterns of discriminatory acts or practices that began before, but continued into, the charge-filing period. Both the Petitioner and the United States as *amicus curiae* seek to have this Court eliminate that

doctrine, although they do not forthrightly ask the Court to do so, and although each attempts a different route to the same result. *Amici* urge the Court to reject these arguments.[2]

Petitioner incorrectly characterizes Title VII as recognizing only "discrete acts" of discrimination, and argues that the charge-filing period begins and ends separately for each "discrete act," such that no discrimination beyond 180 or 300 days is ever actionable. Accordingly, it proposes to substitute for the existing "continuing violation" doctrine a concept of "recurring violations." *Id.* at 21 n.7. Petitioner further suggests that the charge-filing period commences according to a "notice accrual" rule, by which a claim is extinguished within 180 or 300 days of an employee's notice of a discriminatory act, regardless of whether the pattern of discrimination continues thereafter. Petitioner would attach the label "continuing violation" only to conduct that alone is insufficient to constitute a violation, or could not be recognized by the employee to be discrimination. While Petitioner thus argues that damages for violations of the Act are limited by the 180- or 300-day charge-filing period, it does not attempt to reconcile its position with the Act's express provision authorizing back pay for up to two years prior to the filing of a charge. Moreover, Petitioner makes no mention of 42 U.S.C. § 1981a, by which Congress imposed limits on compensatory and punitive damage awards as it made them available under the Civil Rights Act of 1991.

The United States contradicts Petitioner by correctly pointing out that notice is irrelevant to the continuing

2. Because of textual similarities between Title VII and other employment discrimination laws, and because Congress looked to Title VII as a model in enacting such laws, the outcome of this case likely will extend well beyond the confines of Title VII. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (prohibitions of the Age Discrimination in Employment Act derive *in haec verba* from Title VII).

violation doctrine, which looks instead to whether there is actionable conduct consistent with the pre-existing pattern within the charge-filing period. U.S. Br. at 11. But the United States ultimately, but not explicitly, suggests that the charge-filing period commences with notice — even notice before an act of discrimination occurs — and that the continuing violation doctrine does no more than excuse "prior notice" as to a violation *within* the charge-filing period. Thus, it argues that the continuing violation doctrine has no effect except that "a Title VII plaintiff may recover for discrimination that occurs within the charge-filing period despite having notice of a violation outside the period," but then tacks on the distinct assertion "but may not recover for violations that occurred outside the period." U.S. Br. at 17. The United States premises this latter assertion on antitrust law, hornbooks on nuisance and contract law, U.S. Br. at 11-13, and its argument that it is the charge-filing section of the Act, rather than the explicit statutory provisions governing back pay and damage awards, respectively, that limits recovery for a violation. U.S. Br. at 22-26.

Amici write to clarify that the question presented in this case is answered by two distinct inquiries: (1) when a violation under Title VII — particularly a continuing violation — accrues for purposes of § 706(e); and (2) whether the controlling limitations on recoveries for violations of the Act come not from the charge-filing provision of § 706(e), but from the explicit statutory limits on back pay in § 706(g)(1) and on damages in 42 U.S.C. § 1981a. These two inquiries are answered by established precedent and by the statute. First, violations accrue for purposes of § 706(e) when the discrimination "occurs," and a continuing violation — a pattern of conduct or practices that begins prior to, but continues into, the charge-filing period — "occurs" at the time of the last asserted act of the pattern. Second, Congress has provided separate, explicit limits on recoveries that do

not reference the charge-filing provision. At least one of these limits expressly provides for recoveries substantially beyond the charge-filing period. Accordingly, discriminatory conduct prior to and continuing into the charge-filing period is subject to Title VII and relief can be afforded for such violations consistent with the explicit limits on back pay and damages imposed by the statute.

ARGUMENT

I. A "CONTINUING VIOLATION" ACCRUES AT THE TIME OF THE LAST ASSERTED ACT IN THE PATTERN OF DISCRIMINATION.

A. The Continuing Violation Doctrine Postpones Accrual Until The Continuing Wrong Ceases.

Section 706(e) of Title VII provides that a charge of unlawful discrimination must be filed with the EEOC within a specified statutory period (here, 300 days) "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Referring to § 706(e), this Court has stated that "Congress has decided that time limitations periods commence with the date of the 'alleged unlawful employment practice.' " *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). Thus, for purposes of § 706(e), this Court has consistently held that a discriminatory practice "occurs" at the time of the discriminatory acts alleged in the complaint. In *Ricks* this Court emphasized (quoting the Ninth Circuit) that "[t]he proper focus is upon the time of the *discriminatory acts*." *Id.* at 258 (*quoting Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979) (emphasis supplied)); *accord Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 906 (1989). Therefore, "[d]etermining the timeliness of [an] EEOC complaint, and [an] ensuing lawsuit requires [courts] to identify precisely the 'unlawful employment practice' of which [plaintiff] complains." *Ricks*, 449 U.S. at 257.

Where the discriminatory act actually complained of lies outside of the charge-filing period, it is not timely. *Id.* at 257-58 (complaint referred to discriminatory denial of tenure, not termination, thus untimely); *Lorance*, 490 U.S. at 906 (complaint as to diminution in employment status occurred in 1979, so 1983 EEOC complaint untimely); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977) (1973 EEOC charge untimely as to practice that occurred in 1968).

Where the discrimination is not a single, isolated act, but a series of discriminatory acts that are so related as to be fairly regarded as a continuing "unlawful employment practice" or course of conduct, this Court has determined that the discriminatory act "occurs" at the time of the last act asserted to be a part of the pattern. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), so held in circumstances nearly identical to those in this case, in the context of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* There, the question was whether alleged discriminatory acts that predated that Act's 180-day charge-filing period and that were part of a course of conduct continuing into the charge-filing period were actionable under the Fair Housing Act. At the time *Havens* was decided, § 812(a) of the Fair Housing Act, 42 U.S.C. § 3612(a), in language identical to that of Title VII, required that "[a] civil action shall be commenced *within one hundred and eighty days after the alleged discriminatory housing practice occurred*." *Id.* at 380 & n.22 (emphasis added). The plaintiffs in *Havens* alleged "five different specific incidents allegedly in violation of the Fair Housing Act," *id.* at 380, the first four of which were outside the 180-day statutory period. This Court found the complaint to have alleged a continuing violation, and unanimously held that:

> for purposes of [the charge-filing period], a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act

> of discrimination. . . . [W]e therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id. at 380-81. Accordingly, a related course of acts that fairly comprise a practice of discrimination is deemed to "occur," within the meaning of a limitations period, at the "last asserted occurrence" of that pattern of unlawful conduct. *Id.* at 381.

The petitioners in *Havens* argued — without persuading a single member of the Court — that the charge-filing period for each incident ran from the date of that incident. This Court rejected the "Petitioners' wooden application" of the limitations period because it "ignore[d] the continuing nature of the alleged violation" and "undermine[d] the broad remedial intent of Congress embodied in the Act." *Id.* at 380. Here, the Respondent and the United States offer only the same "wooden application" of the identical language of § 706(e) of Title VII. It, too, must be rejected.

Bazemore v. Friday, 478 U.S. 385 (1986), employed the same analysis with respect to discriminatory conduct that predated even Title VII's prohibition on discrimination by state and local government employers. There the Court held actionable a continuing series of unlawful acts that began before the statute's effective date made that conduct unlawful:

> A pattern that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon

> Title VII's effective date, and *to the extent an employer continued to engage in that act or practice, it is liable under that statute.*

Id. at 395. This Court looked to the continuing acts of the defendants that persisted to the time that proceedings were commenced in determining whether the pattern was actionable: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96 (Brennan, J., concurring, joined by all members of the Court).

In *Bazemore*, as in *Havens*, this Court rejected the view that pre-limitations discriminatory conduct could not be reached under the Act. Specifically, the Court rejected the suggestion that differences in salary at the commencement of proceedings were no more than the present effects of past discrimination that was not actionable, as in *United Air Lines v. Evans*, 431 U.S. at 558. *Bazemore* held the distinction to lie in the existence of timely acts of discrimination; in short, the discrimination had not ended before the action was commenced:

> The "critical question," the Court declared, "is whether any *present violation* exists." Because the employer was not engaged in discriminatory practices at the time the respondent in *Evans* brought suit, there simply was no violation of Title VII.

Bazemore, at 396 n.6, *quoting Evans* at 558. Accordingly, *Bazemore*, consistent with the rule in *Havens*, holds that current acts in furtherance of a preexisting pattern of discrimination make that pattern actionable under Title VII.

This Court's cases consistently have recognized that the "continuing violation" doctrine permits Title VII to reach

conduct prior to the charge-filing period where discriminatory acts continue into that period. For example, in *Ricks*, 449 U.S. at 257 (citation omitted), the Court observed:

> In effect, [Ricks] is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his 1-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. If Ricks intended to complain of a discriminatory discharge, he should have identified the *alleged discriminatory acts that continued until, or occurred at the time of*, the actual termination of his employment.

See also Lorance, 490 U.S. at 908 ("petitioners . . . have asserted a claim that is *wholly dependent* on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation") (emphasis added); *Evans*, 431 U.S. at 557-58 (claim of continuing violation rejected because "the critical question is whether any present violation exists").

At least two other courts of appeals have, like the Ninth Circuit, used this same analysis when a course of discrimination is not complete. Applying, inter alia, *Ricks, Lorance, Evans,* and *Bazemore*, the Third Circuit has repeatedly held, " '[i]f the alleged discriminatory conduct is a "continuing violation," the statute of limitations begins to run on the date of the last occurrence of discrimination, rather than the first.' " *Cardenas v. Massey*, No. 00-5225, 2001 WL 1230325 at *2 (Oct. 16, 2001) (quoting *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 842 (3d Cir. 1992)). And the Second Circuit has held, "if a plaintiff has experienced a continuous practice and policy of

discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001). In such situations, like Mr. Morgan's, "a continuing violation may be found where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.*

B. There Is No Foundation In Either Title VII Or In This Court's Cases for the Arguments Advanced By Petitioner And The United States.

Contrary to this Court's cases, Petitioner incorrectly criticizes the continuing violation doctrine, and the court of appeals, as "permitting recovery for *discrete acts* of alleged discrimination years after the expiration of the limitations period." Pet. Br. at 11. The continuing violation doctrine is not available where only discrete acts are alleged. Instead, only continuing, related acts that comprise a pattern of discrimination are considered continuing violations. And, notwithstanding Petitioners' fervent repetition of the words "discrete acts," the prohibitions of Title VII are directed to, and its charge-filing period is triggered by, "unlawful employment *practices*." Nothing in the language of § 706(e) or this Court's civil rights cases supports the proposition that the charge-filing period operates separately for each discrete act of a discriminatory "employment practice," or that violations of the Act that extend beyond the charge-filing period are not actionable. Pet. Br. at 19, 21. In short, Petitioner's imaginative conception of "recurring violations" as a substitute for the established continuing violation doctrine, Pet. Br. at 21 n.7, is wholly without a basis in Title VII.[3]

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3. Similarly, Petitioner's hypothesis that continuing violations should be reserved only for circumstances in which the conduct has

(Cont'd)

Likewise, Petitioner ignores both the clear language of § 706(e) and this Court's cases when it asserts that "this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim." Pet. Br. at 15. This assertion is doubly wrong. The language of § 706(e) expressly provides, and this Court has consistently held, that the charge-filing period commences when the discriminatory act "occurs." And the cases to which Petitioner refers, Pet. Br. at 16-18, refused to apply the continuing violation doctrine not because the plaintiff was "on notice," but because the plaintiff could not (as in *Evans* and *Lorance*) or did not (as in *Ricks*) allege a current discriminatory act.

Further, Petitioner attempts to distinguish *Havens* in a single footnote and suggests, without any reference to *Bazemore*, that the law regarding the effect of limitations periods has developed differently with respect to Title VII and the Fair Housing Act. Pet. Br. at 30 n.8. This Court's holdings and analysis in *Havens*, *Bazemore*, *Evans*, *Ricks*, and *Lorance* all belie Petitioner's suggestion. As noted above, the operative limitations language of § 706(e) is identical to that of the Fair Housing Act in *Havens*, and all these decisions looked to whether there were current acts of discrimination in determining whether a preexisting pattern of such conduct had not ceased and was, therefore, actionable.

(Cont'd)

not yet risen to the level or quantum to constitute a violation, or where an employee could not yet reasonably understand that the conduct is discriminatory, Pet. Br. at 21 n.7, 30-46, is not only contradicted by precedent, but is logically flawed. In the first instance there is simply no violation to be continued. Rather, the violation will "occur," for purposes of § 706(e), if at all, only when the requisite level or quantum of conduct occurs. As to the second, the plaintiff's reasonable inability to understand that an act is discrimination, calls for equitable tolling of § 706(e), which begins to run at the time the act is complete.

Finally, Petitioner proposes that this Court abandon the text and structure of the Act and its own established precedent to adopt analytically flawed and confusing opinions of other courts of appeals. Pet. Br. at 9-10, 38-46. This invitation should be declined. Petitioner holds up a Seventh Circuit opinion, *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), with great enthusiasm, and the Fifth Circuit opinion, *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), with decidedly less fervor. Pet. Br. at 9-10.

Petitioner's choice of *Galloway* as a model for this Court is curious. First, the opinion in this *pro se* appeal affirmed dismissal — after a discussion of the court's views on the relative sex- or gender-relatedness and offensive character of a series of obscenities and vulgarities — on the ground that, on its view of the facts "no inference could be drawn by a reasonable trier of fact that [the alleged harasser's] conduct . . . created a working environment in which [plaintiff] could rationally have considered herself at a disadvantage in relation to her male co-workers by virtue of being a woman." *Galloway*, 78 F.3d at 1168. Thus, such discussion of the continuing violation doctrine as appears in the opinion is *dicta*.

Second, the court's opinion shows that it ignored precedent and statutory language in favor of an untethered, ad hoc approach. It found the continuing violation doctrine "vexing," *id.* at 1165, concluded, on the basis of a hypothetical question, that it gave "too little weight to the social interest in prompt filing," referred to "standard principles of limitations law," and formulated a "concept of *cumulation*," *id.* at 1166 (emphasis in original), that led it to conclude: "It seems to us that in such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute

of limitations; for she had no excuse for waiting that long." To this was added the "additional consideration[s]" that "the bringing of the suit is almost certain to stop the harassment" and "she can always seek injunctive relief against a continuation of the unlawful conduct." *Id.* at 1167. The court concluded, as follows:

> The principle that we extract from this discussion and that we think organizes the complex and diffuse case law on continuing violations under Title VII is that the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Id. (citations omitted).

In this manner, the *Galloway* court formulated its own rule, without discussion of, or reference to, either the language of the statute or this Court's opinions. The court thus ignored the express accrual rule of § 706(e) in favor of an indefinite "notice accrual" rule of its own making. Moreover, it failed to follow consistent precedent that, where unlawful conduct continues into the charge-filing period, the discrimination "occurs" with the last asserted act in the pattern. *Galloway* is not a correct statement of the law, and cannot serve as a model.[4]

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4. The First Circuit opinion in *Sabree v. United Bhd. of Carpenters and Joiners, Local 33*, 921 F.2d 396 (1st Cir. 1990), likewise creates from whole cloth an "inquiry notice" rule that represents a bar to continuing violations that has no basis in § 706(e) or this Court's cases. Indeed, as Petitioner's brief makes clear, the First Circuit considers no factors other than notice.

Ironically, that *Galloway* is inadequate and aberrational is best illustrated by other opinions of the author of *Galloway*. In *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983) (Posner, J.), the Seventh Circuit stated "the general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done," and explained this principle thus:

> The principle strikes a balance between the plaintiff's interest in being spared having to bring successive suits, and the two distinct interests that statutes of limitations serve. One is evidentiary — to reduce the error rate in legal proceedings by barring litigation over claims relating to the distant past. The other is repose. . . . When the final act of an unlawful course of conduct occurs within the statutory period, these purposes are adequately served, in balance with the plaintiff's interest in not having to bring successive suits, by *requiring the plaintiff to sue within the statutory period but letting him reach back and get damages for the entire duration of the alleged violation*. Some of the evidence, at least, will be fresh. And the defendant's uncertainty as to whether he will be sued at all will be confined to the statutory period. His uncertainty about the extent of his liability may be greater, but that is often true in litigation.

Taylor v. Meirick, 712 F.2d 1112, 1116-17, 1118-19 (7th Cir. 1983) (Posner, J.) (emphasis added); *see Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (Posner, J.) (holding, in the context of a prisoner's 42 U.S.C. § 1983 claim, that "all the pain after the date of onset, as it were, of deliberate indifference [by the defendant] was fair game for the plaintiff's suit, by virtue of the doctrine of 'continuing violation'. . . .").

The Fifth Circuit's *Berry* opinion acknowledges an uncertainty as to proper application of the continuing violation doctrine, but discusses the principles and cases. To the extent that Petitioner implies that *Berry* creates a "notice" rule barring continuing violations, it misreads the case. The three factors in *Berry* do not set up a preclusive notice rule, but are intended to provide some guidance in "determining when alleged discriminatory acts are *related closely enough* to constitute a continuing violation and when they are *merely discrete, isolated acts* which must be regarded as individual violations." *Id.* 715 F.2d at 981 (emphasis added). Thus, as in *Evans, Ricks* and *Lorance,* the inquiry focuses on the particular allegation of a discriminatory act, rather than creating a notice bar. Thus, in asking whether "the act ha[s] the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights," the court is trying to identify when the discrimination "occurs" and is complete, as in the denial of tenure in *Ricks*. And in considering permanence "which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate," the court is merely trying to distinguish between completed discriminatory acts, the mere effects of which will be felt in the future (as in *Evans* and *Lorance*), and intentionally discriminatory acts that may be repeated in the future (as in *Bazemore* and *Havens*). Although *Berry*'s factors attempt to distinguish between completed acts and those that give effect to continuing intentional discrimination, its language has been misread to imply a "notice" bar. For this reason, *Berry* is not an effective statement of the proper rule, as are the cases from the Second, Third, and Ninth Circuits, above.

The United States takes a different approach. It attempts to argue that *Havens* and *Bazemore* stand for the proposition "that a Title VII plaintiff may recover for discrimination that

occurs within the charge-filing period *despite having notice* of a violation outside the period, but may not recover for violations that occurred outside the period." U.S. Br. at 17-19. But even its own discussion of the cases cannot conceal that discriminatory patterns of conduct outside of the limitations period were held to be actionable, and that the determining factor was not notice, but the existence of a "*present violation*" that continued that discriminatory pattern of conduct. U.S. Br. at 17, *quoting Bazemore* at 396 n.6. Indeed, its brief acknowledges that in *Havens*, "the plaintiffs could sue because they had alleged 'an unlawful practice that continue[d] into the limitations period,' " U.S. Br. at 18 (*quoting Havens* at 381), and adds that in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 & n.5 (1989), the Court noted that facially discriminatory seniority systems "can be challenged at any time" and that under the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2), Congress provided that the subsequent operation of facially neutral but intentionally discriminatory seniority systems could be challenged. U.S. Br. at 17-18 & n.6.

Indeed, the government's brief itself confirms that Congress intended the accrual rule for continuing violations that this Court has followed. The brief quotes from the legislative history of the 1972 amendments to the Act, to the effect that where there are continuing violations, "measuring the running of the time period from the last occurrence of the discrimination and not from the first occurrence is continued." U.S. Br. at 16 *quoting* 118 Cong. Rec. at 4940, 4941. Even as Congress then confirmed the "last occurrence" accrual rule for conduct predating the charge-filing period, it also provided for the accrual of back pay for up to two years prior to the charge-filing period, in § 706(g)(1) of the Act. Yet the United States argues, in contradiction to the obvious intent and effect of the 1972 back pay amendments, without any textual or structural support in the Act, and contrary to established case law, that conduct outside the statute is not actionable.

Thus, the United States agrees with Petitioner that this question should be decided not with reference to the language and interpretations of Title VII, but according to decisions regarding the Clayton Act and civil RICO. Yet the operative limitations of those statutes differ from Title VII and the terms of those statutes provide for recoveries spanning remarkable periods of time. For example, in determining limitations questions regarding civil RICO, the Court has been mindful of the fact that the statute's definition of "pattern" may well permit proof of acts 14 years before a lawsuit is filed. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000). And the recovery permitted by the applicable statute of limitations for the continuing violation in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), included injuries sustained between 1939 and 1955. *Id.* at 484, 495, 502 n.15. Finally, this Court has been concerned that the peculiar availability of treble damages in these statutes would pose a great temptation for plaintiffs deliberately and unfairly to delay in filing suit in order to profit from the accumulation of treble damages. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Petitioner's deletion of the word "treble" from its quotation of *Klehr* is plainly not an attempt to save space. *See* Pet. Br. at 47 (excising the word "treble" to produce a sentence condemning plaintiffs who delay suit "as the pattern continues and * * * damages accumulate"). As Petitioner is keenly aware, these statutes are anything but analogous to Title VII, with its 180- or 300-day charge-filing period, a two-year limit on back-pay awards, and damages capped at anywhere from $50,000 to $300,000 (depending on the size of the employer).

As well, although Petitioner and the United States correctly note that Title VII's remedial provisions are, at least in part, modeled on the National Labor Relations Act, those parallel provisions need not and should not *ipso facto* be construed in identical ways — because their underlying purposes differ greatly. *See Chauffeurs, Teamsters & Helpers,*

Local No. 391 v. Terry, 494 U.S. 558, 573 (1990) (rejecting the argument that "if Title VII is comparable to one labor law remedy it is comparable to all remedies available in the NLRA context"); *see also Hammontree v. N.L.R.B.*, 925 F.2d 1486, 1498 (D.C. Cir. 1991) (citing "broad[] conceptual differences between the remedial regimes created by Title VII and the NLRA"). Title VII's broad remedial and prophylactic purposes, *see infra* Part III, are not necessarily served by the same doctrines that help secure present and future "industrial peace" under the NLRA, *e.g., Auciello Iron Works, Inc. v. N.L.R.B.*, 517 U.S. 781, 785 (1996). Nevertheless, the NLRA recognizes continuing violations, *see Melville Confections, Inc. v. N.L.R.B.*, 327 F.2d 689, 692 (7th Cir. 1964), and interpretations of the availability of relief under that statute are irrelevant, because it has no express provisions governing the extent of relief permitted and does not afford all of the relief that Title VII does in § 706(g)(1) and 42 U.S.C. § 1981a.

Moreover, the position of the United States in this brief is of recent origin, and contradicts the formal, established interpretations of the federal agency charged with the responsibility to interpret and enforce Title VII.[5]

C. The EEOC's Own Rule, To Which This Court Owes "Great Deference," Is Identical to the Rule Applied By the Court of Appeals.

The court of appeals applied the same rule that the EEOC has adopted in its official interpretation of Title VII. As this Court has noted in upholding EEOC interpretations of Title VII, "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *accord, e.g.,*

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5. *See* Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondent.

Gregory v. Ashcroft, 501 U.S. 452, 493 (1991). The EEOC compliance manual explains "continuing violations" as follows:

> In contrast to a charge which involves an event that transpired on a certain date, a continuing violation takes place over a period of time, including into the filing period. Where a charge raises a continuing violation, *all of the events forming part of the continuing violation, including those that transpired outside the filing period, are considered timely*, and *relief may be obtained for all of the discriminatory events*.

EEOC Compliance Manual § 2-IV.C.2 (EEOC Directives Transmittal, Aug. 21, 2001, at 40) (emphasis added). This directive follows the recent EEOC opinion in *Anisman v. O'Neill*, 2001 WL 402493 (E.E.O.C. Apr. 12, 2001), where the Commission explained its rationale:

> [E]vidence that a complainant had, or should have had, a reasonable suspicion of discrimination more than 45 days prior to initiating EEO Counselor contact, will not preclude acceptance of an otherwise timely claim of ongoing discrimination. This holding is directly related to one of the major goals of the revised 29 C.F.R. Part 1614 regulations, that is, to address the problem of fragmentation of unlawful employment practice claims. . . .
>
> When a continuing violation is alleged, *the running of the period for initiating a Title VII complaint starts from the most recent occurrence of the alleged discrimination* and not from the first occurrence.

Id. at *4-5 (emphasis added).

The EEOC, which as the enforcing agency for Title VII is thoroughly familiar with the day-to-day operation of the statute, has adopted a definition for continuing violations of Title VII consistent with the language, structure, and legislative intent of the statute and with this Court's precedent. Certainly the EEOC has every incentive to craft rules that reduce litigation and increase voluntary employer compliance, while ensuring that cases are prosecuted in a timely manner. This Court should defer to the considered, consistent judgment of this statutory agency.

II. TITLE VII'S EXPLICIT PROVISIONS AFFORDING RELIEF SHOULD NOT BE UNDERCUT BY AN IMPLIED LIMITATION BASED ON THE CHARGE-FILING PROVISION.

Congress has affirmatively provided a sophisticated remedial scheme that specifies when and by what means various remedies are available under Title VII. These remedial provisions make no reference to the charge-filing period as a limitation on remedies; likewise, the charge-filing provision speaks only to filing and says nothing about remedies ("A charge under this section shall be filed within [either 180 or 300] days after the alleged unlawful employment practice occurred. . . ."). Thus, both the structure and language of the sections of the Act that afford remedies preclude the use of the charge-filing period as a judicial limitation on remedies. Section 706(g)(1) of the Act, with its two-year limit on back pay awards, clearly provides relief for acts outside the 180- or 300-day charge-filing period — and thus is evidence that Congress has endorsed the existing continuing violation doctrine. Section 1981a's graduated schedule of caps on compensatory and punitive damages contains Congress's affirmative and express judgment with respect to the issue of limits on Title VII damage awards. This Court must honor Congress's judgments on these matters and cannot accept the invitation of Petitioner and the United States to imply an inconsistent additional limit from the charge-filing provision in § 706(e) of the Act.

A. By Its Plain Terms, Section 706(g)(1) Provides For the Award of Monetary Relief Covering A Period Longer Than the Statutory Filing Period.

Section 706(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). And since back pay can "accrue" only if it is caused by a violation, it follows from the language of § 706(g)(1) that a plaintiff can seek to establish employer liability for actions outside the statutory period. That is, it expressly provides relief pursuant to the continuing violation doctrine as it exists in *Evans, Ricks, Havens, Bazemore, and Lorance*, and as articulated by the EEOC, *see* EEOC Compliance Manual, *supra*, § 2-IV.C.2 ("Where a charge raises a continuing violation, . . . relief may be obtained for all of the discriminatory events," "including those that transpired outside the filing period").

Not only does § 706(g)(1) explicitly contemplate relief outside the filing period, but the express language of that section strongly suggests that this two-year limit on back pay is the *only* limit on relief awarded under that section. Various equitable remedies are permitted, yet the only mention of any limit on any of these forms of relief is the above-quoted two-year limit on backpay:

> If the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice . . . , the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief

> as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

The clear effect of this language is that if a court "deems appropriate," any "equitable relief" except backpay *may* reach back beyond two years of the filing date. And in either event, the charge-filing period does not itself operate an independent limitation.

This Court's cases confirm that § 706(e)(1) does not limit the relief that may be awarded under § 706(g)(1). In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976), this Court rejected a similar request to import a limit into § 706(g)(1) from another section of the Act (§ 703(h), 42 U.S.C. § 2000e-2(h)). The Court observed that "[s]ection 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706." So it is here; § 706(e) plainly speaks to when a charge must be filed, not to how far back appropriate relief may be granted. Similarly, just a few months ago this Court unanimously rejected an attempt to import damage caps as a limit on § 706(g)(1) remedies. *See Pollard v. E.I. Du Pont De Nemours & Co.*, 121 S. Ct. 1946 (2001). And in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court referred to the two-year limit on back pay as the sole, determinative temporal limit on such relief. *See id.* at 410 n.3 ("Under Title VII backpay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC.").

B. In Providing For Compensatory and Punitive Damages Under Title VII, Congress Chose a Detailed Schedule of Limitations Drastically Different From The Charge-Filing Period.

In the 1991 amendments to Title VII, Congress placed a sophisticated set of caps on the dollar amounts recoverable for compensatory and punitive damages, calibrated to the size of the employer:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20

or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3). This legislative decision shows that Congress has determined the issue of the availability and limits on Title VII damage awards, without any reference to the charge-filing period. This Court may not create a different standard. Even if this Court were to agree with the policy judgments offered by Petitioner and the United States, this Court may not imply additional limits by adopting a contradictory construction of the remedial scheme.

When the United States observes that "[d]ollar limits on damages are compatible with temporal limits on recovery," U.S. Br. at 25, it is stating only that it is logically possible to impose a different, additional limit on Title VII awards — a cutoff based on the charge-filing provision (a section of the statute that makes no reference to relief), in addition to the more expansive two-year limit on back pay and the entirely different damage cap scheme decided upon by Congress. It may well be possible to add another limit, but that does not make it this Court's prerogative to do so.

III. THE EXISTING CONTINUING VIOLATION DOCTRINE COMPORTS WITH LEGISLATIVE INTENT, FOSTERS JUDICIAL ECONOMY, AND PROMOTES EQUITY.

A. The Established Continuing Violation Doctrine Endorsed and Facilitated by Congress Serves the Purposes of Title VII.

As this Court has noted, its decisions in this area must "be measured against the purposes which inform Title VII." The Court has sought to enunciate rules "which, if applied generally" in Title VII cases, "would not frustrate the central statutory purposes of [1.] eradicating discrimination

throughout the economy and [2.] making persons whole for injuries suffered through past discrimination." This Court has required "principled application of standards consistent with" these two "transcendent legislative purposes." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. at 429-30). Here, the established continuing violation doctrine is the only rule that comports with these directives.

The primary, "prophylactic" purpose of Title VII is served by the preservation of incentives for employers to eradicate discrimination. If an employer knows it may be liable for *any* continuing course of discrimination, it will have strong incentives to end such treatment. Only such a rule serves Title VII's aim to "motivate employers to detect and deter Title VII violations." *Kolstad v. American Dental Ass'n*, 119 U.S. 2118, 2121 (1999). Further, repose is served, once continuing discrimination has stopped or after a discrete, non-continuing violation.

A contrary rule linking the continuing violation doctrine to "notice" would place enormous litigation burdens on employees by virtually assuring employers that they can never be held liable for more than 300 continuous days of intentional discrimination in a single lawsuit. It would also place the onus on the employee to divine the precise moment when a court will find that there is enough discrimination to bring suit, but not so much discrimination that damages for some of the discrimination are already out of reach because of "notice". Placing these burdens on employees would contravene the Court's teaching that underlying Title VII is a basic policy of "encouraging forethought by employers and saving action by objecting employees." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *see also id.* at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."); *cf.* 29 C.F.R. § 1604.11(f) (1997) (encouraging

employers to develop grievance procedures and to "take all steps necessary to prevent sexual harassment from occurring").

The United States argues that if the charge-filing period were construed as a remedial limit (notwithstanding the express language of the statute to the contrary), employers would "always have an incentive to comply with Title VII, because their ongoing violations remain actionable." U.S. Br. at 9. It states this as though it is somehow remarkable that its reading of Title VII preserves the viability of claims based on *present* discrimination. Congress did not enact or intend such a crabbed rule. This Court has stated, in the related context of awards of backpay under Title VII, "[i]t is the reasonably certain prospect of a backpay award that *provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices* and to endeavor to eliminate" discrimination. *Albemarle*, 422 U.S. at 417-18 (emphasis added). Similar logic applies here. The established continuing violation doctrine is crucial to providing "the spur or catalyst" for employers "to self-examine."[6] In the same spirit, this Court has taught that "[w]here racial discrimination is concerned, [a] district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

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6. Such incentives for self-examination reinforce and complement the broad affirmative duties Title VII imposes on employers to avoid or prevent violations of Title VII. *See Faragher*, 524 U.S. at 806. Courts have not hesitated to find that where employers take modest affirmative measures they can predictably protect themselves from Title VII liability. *See, e.g., Scrivner v. Socorro Indep. Sch Dist.*, 169 F.3d 969, 971-72 (5th Cir. 1999) (employer not liable because it had an effective anti-harassment policy and responded promptly to complaints); *Stuart v. General Motors Corp.*, 217 F.3d 621 (8th Cir. 2000) (employer's response to complaints relieved employer of liability).

There is no tradeoff here between prompt filing and incentives for employers to eliminate unlawful discrimination. As noted, there is no incentive to postpone suit because there are no treble damages. Moreover, this Court has stated that in order for the continuing violation doctrine to apply there must be a "continu[ation]" of the same "act or practice," *Bazemore*, 478 U.S. at 395, a requirement which adequately protects against attempts to revive discrete, unrelated, time-barred acts. And employees already are required to put their employers on notice of their *Faragher* complaints. *See supra* n.6.

In any event, under this Court's teachings, continuing violations are by definition not stale. Thus, this case is not about weighing repose against other possible ends to be served; rather, it is about determining whether there is any staleness concern at all. "Where the challenged violation is a continuing one, the staleness concern disappears." *Havens*, 455 U.S. at 380.

B. Grafting A "Notice" Limitation Onto Section 706(e) Would Encourage Multiple, Premature Lawsuits.

A "notice accrual" rule for Title VII suits would put a premium on precipitous and duplicative litigation, sending a message to employees that, essentially, sooner is usually safer. It would threaten to penalize, and thereby would push toward federal courthouses, others who, like Mr. Morgan, might otherwise attempt less drastic measures to resolve disputes and to give employers opportunities to correct violations outside the legal process.

Furthermore, under a rule that measures accrual at each day of violation, "make whole" relief would require multiple lawsuits instead of a single lawsuit for a related series of acts or continuing course of action. Potentially, every day is another cause of action. As noted in the context of § 1983 claims, "[w]e have enough prisoners' suits without having to create incentives to bring multiple suits arising out of the same course of events." *Heard*, 253 F.3d at 320.

Mr. Morgan's case provides an example of these problems and the unfairness that a notice accrual rule limitation would create. With regard to each incident of discrimination, he diligently sought means of resolving the problem short of a federal lawsuit. It is frankly appalling to have Amtrak disingenuously assert — without any regard to the history of Mr. Morgan's persistent appeals to Amtrak to address the discrimination of Messrs. Vandenburg, Denton, Bordenave, Borge, Geske, and others — that Mr. Morgan has somehow "knowingly [sat] on his . . . rights". Pet. Br. at 46. And it would be far too generous to suggest that Amtrak was merely "sitting." Despite persistent pleas for redress, Amtrak knowingly permitted its managers to pursue their pattern of discrimination against Mr. Morgan. It would thwart the purposes of Title VII to allow the very notice that should have spurred Amtrak to action to be used against Mr. Morgan.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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